Nos. 91-261 and 91-274

JUN 22 1992
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In the Supreme Court of the United States

OCTOBER TERM, 1992

BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT, PETITIONER

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

MASSACHUSETTS WATER RESOURCES AUTHORITY AND KAISER ENGINEERS, INC., PETITIONERS

v.

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., ET AL.

On Writs of Certiorari to the United States Court of Appeals for the First Circuit

JOINT APPENDIX

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CERTIORARI GRANTED MAY 18, 1992

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Case #: 90-CV-10576

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND,
Plaintiff

ASSOCIATED BUILDERS AND CONTRACTORS, INC.,
Plaintiff

CONCRETE STRUCTURES, INC.,
Plaintiff

FRASER ENGINEERING COMPANY, INC.,
Plaintiff

PLUMB HOUSE, INC.,
Plaintiff

CHARWILL CONSTRUCTION, INC.,
Plaintiff

CHESTERFIELD ASSOCIATES, INC.,
Plaintiff

v.

WATER RESOURCES AUTHORITY, MASSACHUSETTS, and its Board of Directors in their official and individual capacities,
Defendant

JOHN P. DEVILLARS, Chairman, in his official and individual capacity,
Defendant

JOHN J. CARROLL, Vice Chairman, in his official and individual capacity,
Defendant

LORRAINE M. DOWNEY, Secretary, in her official and individual capacity,
Defendant

ROBERT J. CIOLEK, Member in his official and individual capacity,
Defendant

WILLIAM A. DARITY, Member in his official and individual capacity,
Defendant

ANTHONY V. FLETCHER, Member in his official and individual capacity,
Defendant

CHARLES LYONS, Member in his official and individual capacity,
Defendant

SAMUEL G. MYGATT, Member in his official and individual capacity,
Defendant

THOMAS E. REILLY, JR., Member in his official and individual capacity,
Defendant

WALTER J. RYAN, Member in his official and individual capacity,
Defendant

KAISER ENGINEERS, INC.,
Defendant

THE BUILDING AND CONSTRUCTION TRADES COUNCIL OF THE METROPOLITAN DISTRICT,
Defendant

DOCKET ENTRIES

Date	No.	Proceedings
3/5/90	1	Complaint for Injunctive and Declaratory Relief and for Money Damages filed (lt) [Entry date 03/06/90]
3/5/90	—	Filing Fee Paid; FILING FEE $120.00 RECEIPT #02364 (lt) [Entry date 03/06/90]
3/5/90	2	Motion by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc, Massachusetts Water, Kaiser Engineers, Inc., Building and Const for preliminary injunction (lt) [Entry date 03/06/90]
3/5/90	3	Memorandum of Points and Authorities by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc, Massachusetts Water, Kaiser Engineers, Inc., Building and Const in support of [2-1] motion for preliminary injunction (lt) [Entry date 03/06/90]
3/5/90	4	Notice of appearance by Carol Chandler, Mary L. Marshall, Michael Getman for plaintiffs filed. (lt) [Entry date 03/06/90]
3/5/90	5	Motion by Associated Builders for Maurice Baskin to appear pro hac vice (tmm) [Entry date 03/06/90]
3/5/90	6	Affidavit by Concrete Structures Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	7	Affidavit by Charwill Const Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	8	Affidavit by Associated Re: [1-1] complaint (tmm) [Entry date 03/06/90]

Date	No.	Proceedings
3/5/90	9	Affidavit by Associated Builders Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	10	Affidavit by Plumb House, Inc. Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	11	Affidavit by Chesterfield Assoc Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/5/90	12	Affidavit by Fraser Engineering Re: [1-1] complaint (tmm) [Entry date 03/06/90]
3/8/90	13	Motion by Massachusetts Water for reassignment as related case. (tmm)
3/8/90	14	Motion by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc for leave to file Memoranda in Support of Motion for P/I exceeding twenty pages. (tmm) [Entry date 03/09/90]
3/9/90	15	Motion by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc for assignment of hearing date and agreement to transfer case. (tmm) [Entry date 03/12/90]
3/14/90	16	Notice of attorney appearance for Building and Const by Donald J. Siegel, Paul F. Kelly, Mary T. Sullivan. (tmm) [Entry date 03/15/90]
3/14/90	17	Response by Building and Const to [15-1] motion for assignment of hearing date and agreement to transfer case., [13-1] motion reassignment as related case. (tmm) [Entry date 03/15/90]
3/14/90	18	Notice of attorney appearance for Massachusetts Water by John M. Stevens. (tmm) [Entry date 03/19/90]

Date	No.	Proceedings
3/14/90	19	Response by Massachusetts Water in opposition to [15-1] motion for assignment of hearing date and motion for enlargement of time for the Dfts. to respond to the P's application for a P/I to 4/9/90. (tmm) [Entry date 03/19/90]
3/19/90	20	Notice of filing original affidavits by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc (tmm) [Entry date 03/20/90]
3/22/90	21	Response by Associated Builders in opposition to [19-1] opposition response. Oppo. to Motion for Extension of Time and Postponement of Hearing date. (tmm)
3/22/90	22	Motion by Building and Const for leave to file brief in excess of twenty pages. (tmm) [Entry date 03/23/90]
3/22/90	23	Response by Building and Const in opposition to [2-1] motion for preliminary injunction (tmm) [Entry date 03/23/90]
3/22/90	24	Memorandum by Building and Const in opposition to [2-1] motion for preliminary injunction (tmm) [Entry date 03/23/90]
3/22/90	25	Motion by Massachusetts Water for leave to file memo. in excess of twenty pages. (tmm) [Entry date 03/23/90]
3/22/90	26	Response by Massachusetts Water in opposition to [2-1] motion for preliminary injunction and Memo. in opposition. (tmm) [Entry date 03/23/90]
3/22/90	27	Affidavit of Richard D. Fox Re: [26-1] opposition response (tmm) [Entry date 03/23/90]

Date	No.	Proceedings
3/22/90	28	Affidavit of Kenneth M. Willis Re: [26-1] opposition response (tmm) [Entry date 03/23/90]
3/22/90	29	Motion by Massachusetts Water for E. Carl Uehlein, Jr. and James J. Kelley to appear pro hac vice (tmm) [Entry date 03/23/90]
3/23/90	—	Judge Rya W. Zobel. Endorsed Order (tmm)
3/27/90	—	Judge Rya W. Zobel. Endorsed Order granting [13-1] motion reassignment as related case. All parties, except Kaiser Engineers, Inc., having either assented to or having opposition to this motion and after consultation with Judge Mazzone I find that this case is related to C.A. 85-0489-MA, and it is therefore ordered that the Clerk reassign this case to Judge Mazzone. Entered. (tmm)
3/27/90	—	Case reassigned to Judge A. D. Mazzone (tmm)
3/27/90	30	Notice of reassignment of case to Judge Mazzone issued. (tmm)
3/27/90	31	Return of services (3) executed as to Anthony V. Fletcher, Charles Lyons, Thomas E. Reilly Jr. dated 3/7/90 Answer due on 3/27/90 for Thomas E. Reilly Jr., for Charles Lyons, for Anthony V. Fletcher (lt) [Entry date 04/09/90]
3/27/90	32	Return of service executed as to Massachusetts Water, John P. DeVillars, John J. Carroll, Lorraine M. Downey, Robert J. Ciolek, William A. Darity, Samuel G. Mygatt, Walter J. Ryan Jr., Kaiser Engineers, Inc., Building and Const 3/8/90 Answer due on 3/28/90 for Building and Const, for Kaiser Engineers, In, for Walter J. Ryan Jr., for Samuel G. Mygatt, for William A. Darity, for Robert J. Ciolek,

Date	No.	Proceedings
		for Lorraine M. Downey, for John J. Carroll, for John P. DeVillars, for Massachusetts Water (lt) [Entry date 04/09/90]
3/28/90	33	Motion by Individual Defendants John P. DeVillars, John J. Carroll, Lorraine M. Downey, Robert J. Ciolek, William A. Darity, Anthony V. Fletcher, Charles Lyons, Joseph A. MacRitchie, Samuel G. Mygatt, Thomas E. Reilly Jr., Walter J. Ryan Jr. to dismiss (lt) [Entry date 04/09/90]
3/28/90	34	Memorandum by John P. DeVillars, John J. Carroll, Lorraine M. Downey, Robert J. Ciolek, William A. Darity, Anthony V. Fletcher, Charles Lyons, Joseph A. MacRitchie, Samuel G. Mygatt, Thomas E. Reilly Jr., Walter J. Ryan Jr. in support of [33-1] motion to dismiss (lt) [Entry date 04/09/90]
3/28/90	35	Answer to Complaint by defendants Massachusetts Water, Kaiser Engineers, Inc. filed. (lt) [Entry date 04/09/90]
3/28/90	36	Answer to Complaint by defendant Building and Construction Trades Council of the Metropolitan District. (lt) [Entry date 04/09/90]
4/2/90	37	Motion by plaintiffs, Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc for leave to file reply memo to the Oppos. to ABC's Mtn for PI. (lt) [Entry date 04/09/90]
4/4/90	—	Judge A. D. Mazzone. Endorsed Order granting [37-1] motion for leave to file reply memo (lt) [Entry date 04/09/90]

Date	No.	Proceedings
4/4/90	38	Reply by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc to Defendants' Oppositions/response to ABC's Mtn for PI. (lt) [Entry date 04/09/90]
4/4/90	39	Motion of "Amicus Curiae" Attorney General of Mass. for leave to file Mem. Spt. Ds' Position on PI (lt) [Entry date 04/09/90]
4/4/90	—	Judge A. D. Mazzone. Endorsed Order granting [39-1] motion for leave to file Mem. Spt. Ds' Position on PI (lt) [Entry date 04/09/90]
4/4/90	41	Judge A. D. Mazzone. Clerk's Notes: Case called for hearing on P's motion for PI and motion to appear pro hac vice. Motion for PI taken under advisement; Motion to appear pro hac vice is ALLOWED. (mgg) [Entry date 04/10/90]
4/4/90	—	Judge A. D. Mazzone. Endorsed Order granting [5-1] motion for Maurice Baskin to appear pro hac vice [2-1] motion for preliminary injunction taken under advisement (mgg) [Entry date 04/10/90]
4/5/90	40	Memorandum of Amicus Curiae Attorney General of MA in support of Ds' Position of Prel. Relief. (lt) [Entry date 04/09/90]
4/10/90	42	Affidavit by Associated Builders Re: [2-1] motion for preliminary injunction (mgg) [Entry date 04/11/90]
4/10/90	43	Affidavit by Kevin Feeley, Massachusetts Water Re: [2-1] motion for preliminary injunction (mgg) [Entry date 04/11/90]

Date	No.	Proceedings
4/16/90	44	Memorandum by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc., in opposition to [33-1] motion to dismiss (lt) [Entry date 04/20/90]
4/16/90	45	Transcript of 4/4/90 Ctrm #4., Mazzone, D.J. hearing filed by Court Reporter Gibbons. (lt) [Entry date 04/20/90]
4/16/90	46	Notice of appeal by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc Fee Status: unpaid Appeal record due on 5/16/90 (lt) [Entry date 04/20/90]
4/19/90	47	Motion by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc for preliminary injunction pending appeal. (lt) [Entry date 04/20/90]
4/24/90	48	Memorandum by Massachusetts Water, John P. DeVillars, John J. Carroll, Lorraine M. Downey, Robert J. Ciolek, William A. Darity, Anthony V. Fletcher, Charles Lyons, Samuel G. Mygatt, Thomas E. Reilly Jr., Walter J. Ryan Jr., Kaiser Engineers, Inc., Building and Const in opposition to [47-1] motion for preliminary injunction (lt) [Entry date 05/14/90]
4/26/90	—	Certified copy of docket and record on appeal forwarded to U.S. Court of Appeals: [46-1] appeal (lt)
4/27/90	—	Judge A. D. Mazzone. Endorsed Order denying [47-1] motion for preliminary injunction pending appeal. (lt) [Entry date 05/14/90] [Edit date 05/14/90]

Date	No.	Proceedings
4/27/90	49	Judge A. D. Mazzone. Memorandum and Order re Individ. Ds'Mtn to Dismiss and Opp. denying prel. relief . . . Denied . . . . cc/cl. (lt) [Entry date 05/14/90]
4/30/90	50	Response by Building and Const in opposition to [47-1] motion for preliminary injunction (efs) [Entry date 05/14/90]
5/9/90	51	Amended/Subsequent Notice of appeal by Associated Builders, Associated, Concrete Structures, Fraser Engineering, Plumb House, Inc., Charwill Const, Chesterfield Assoc re: [46-1] appeal (amended notice to USCA from U.S. Court's Order denying Ps' Mtn for PI entered 4/11/90, by naming all plaintiffs/appellants in the body and in the caption of the notice) filed. c/s. (lt) [Entry date 05/16/90]
5/16/90	—	Transmitted supplemental record on appeal: [46-1] appeal (lt)
5/17/90	—	Transmitted supplemental record on appeal #47, 48, 49. (sad)
10/24/90	52	Opinion from USCA . . . the decision of the district ct is reversed and mandate shall ensue forthwith with instructions to the dist ct that it issue an order preliminarily enjoining enforcement of Specification 13.1, Reversed and remanded. (mcm) [Entry date 10/26/90]
10/25/90	53	Mandate of USCA Re: [46-1] appeal reversing and remanding to the district court with instructions to issue an order preliminarily enjoining enforcement of specification 13.1. cost to appellants. (mcm) [Entry date 10/26/90]

Date	No.	Proceedings
10/29/90	55	USCA Opinion date 10/29/90 case before Campbell and Torruella . . . Specification 13.1 unduly restricts aspects of the labor mgmt relationship . . . decision of the district court is reversed and mandate shall ensue forthwith w/intruction to the dist ct that it issue an order preliminarily enjoining enforcement of Spec 13.1, Filed. (mcm) [Entry date 11/02/90]
11/1/90	54	Ltr to Judge Mazzone from Carol Chandler and Maurice Baskin re: enclosing a proposed order . . . plt request order be issued expeditiously . . . pltfs also request that order enjoining enforcement of Specification 13.1 be entered as soon as possible, attached proposed order, Filed. (mcm)
11/2/90	56	Memorandum by Massachusetts Water in opposition to Submission with respect to form of order granting P/I, filed c/s. exhibits attached. (mcm) [Entry date 11/08/90]
11/5/90	—	Record on appeal returned from U.S. Court of Appeals: filed this date. (mcm)
11/5/90	57	Judge A. D. Mazzone. Order of the Court Entered Nov 5, 1990, upon consideration of the mtn for clarification of instruction to the Dist Ct and stay or w/d of mandate, and opp thereto, ORDERED the Motion is denied. Mtn for expedited consideration of pending mtn is moot, Filed. (mcm) [Entry date 11/09/90]
11/9/90	61	Judge A. D. Mazzone. Order . . . that Pltf's Mtn for P/I is hereby granted and Dft's are hereby enjoined from enforcing MWRA Bid Specification 13.1 in connection w.the Boston Harbor Wastewater Treatment Project, (mailed to all cnsl D.W.) filed c/s. (mcm) [Entry date 11/20/90]

Date	No.	Proceedings
11/16/90	58	Ltr to Ms. Whitney from J. O'Reilly re: Mtn of A.Welch Corp. filed. (mcm) [Entry date 11/19/90]
11/16/90	59	Motion of Albert J. Welch Corp. to intervene for limited purposes request for oral argument, Filed, c/s. (lt) [Entry date 11/19/90]
11/16/90	60	Affidavit of Robert Mercardo V.P. for intervenor/pty. Albert J. Welch, Re: [59-1] motion to intervene for limited purposes, Filed, c/s. (lt) [Entry date 11/9/90]
11/30/90	62	Response by Associated Builders pltfs., in opposition to [0-0] MWRA's Submission/remark with Respect to Outstanding Contract, Filed, c/s. (lt)
12/7/90	63	Response by Massachusetts Water in opposition to [47-1] motion for preliminary injunction . . . for order enforcing injunction, filed c/s. (mcm) [Entry date 12/10/90]
1/4/91	64	Motion by Massachusetts Water for dissolution of Preliminary Injunction entered on 11/9/90 restraining dfts from enforcing MWRA Bid Specification 13.1 in connection w/Boston Harbor Wastewater Treatment Project., filed c/s. (mcm) [Entry date 01/07/91] [Edit date 01/08/91]
1/7/91	65	Response by Associated Builders in opposition to [64-1] motion for dissolution of Preliminary Injunction and mtn for extension of Injunction pending appeal, filed c/s. (mcm) [Entry date 01/08/91]
1/9/91	—	Judge A. D. Mazzone. Endorsed Order denying [65-1] opposition response, Mtn for extension of injunction DENIED, cc/cl. (mcm)

Date	No.	Proceedings
1/9/91	—	Judge A. D. Mazzone. Endorsed Order granting [64-1] motion for dissolution of Preliminary Injunction . . . ALLOWED. After consideration of the course of this litigation, its affect on the parties and the courts schedule, and the order of the court of Appeals vacating its Jgm I conclude this mtn should be allowed and the status quo restored. Recognizing the uncertainty exisiting the MWRA should consider carefully its interim bidding procedure in order that delay be minimized or avoided when an ultimate decision is rendered by the court of Appeals cc/cl. (mcm)
1/9/91	66	Dft MWRA submission with respect to Mtn for Injunction pending appeal, exhibits attch, filed c/s. (mcm)
1/10/91	68	Order Entered by USCA on 1/10/91 . . . Case remanded to district court for re-entering the injunction that was in effect from 11/9/90 through 1/9/91 pending further order of this court, filed. (mcm) [Entry date 01/11/91]
1/31/91	69	Judge A.D. Mazzone. Order entered . . . Pursuant to the Order entered by the Court of Appeals on 1/10/91, my order of January 9, 1991, is vacated, and the injunction that was in effect from November 9, 1990, through January 9, 1991, is re-entered pending further order of this Court, ISSUED cc/cl. (mcm) [Entry date 02/01/91]
2/1/91	—	Transmitted supplemental record on appeal: entire case file forwarded on supplemental certificate. (kmn) [Entry date 02/04/91]
2/4/91	—	Transmitted supplemental record on appeal: document #69 (kmn) [Entry date 02/07/91]

Date	No.	Proceedings
6/6/91	70	Mandate of USCA Re: reversed and the cause is remanded to the district court for further proceedings consistent with the opinion issued this date. JGM ENTERED ON May 15, 1991, Costs in favor of appellants are taxed at 996.51, filed. (mcm)
9/26/91	—	Terminated document(s) [47-1] motion for preliminary injunction, [33-1] motion to dismiss, [29-1] motion for E. Carl Uehlein, Jr. and James J. Kelley to appear pro hac vice [25-1] motion for leave to file memo. in excess of twenty pages., [22-1] motion for leave to file brief in excess of twenty pages., [15-1] motion for assignment of hearing date and agreement to transfer case. [14-1] motion for leave to file Memoranda in Support of Motion for P/I exceeding twenty pages., [2-1] motion for preliminary injunction Requested by dlw. (lt)
6/4/92	71	Letter from Francis Scigliano, Clerk USCA, requesting that the case file be sent to the Supreme Court of the United States, received. (kmn) [Entry date 06/05/92]

[END OF DOCKET: 1:96cv10576]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 90-CV-10576

ASSOCIATED BUILDERS AND CONTRACTORS OF MASSACHUSETTS/RHODE ISLAND, INC., and ASSOCIATED BUILDERS AND CONTRACTORS, INC., and CONCRETE STRUCTURES, INC., and FRASER ENGINEERING COMPANY, INC., and PLUMB HOUSE, INC., and CHARWILL CONSTRUCTION, INC., and CHESTERFIELD ASSOCIATES, INC., PLAINTIFFS

v.

THE MASSACHUSETTES WATER RESOURCES AUTHORITY and its Board of Directors, JOHN P. DEVILLARS, Chairman, JOHN J. CARROLL, Vice Chairman, LORRAINE M. DOWNEY, Secretary, ROBERT J. CIOLEK, member, WILLIAM A. DARITY, member, ANTHONY V. FLETCHER, member, CHARLES LYONS, member, SAMUEL G. MYGATT, member, THOMAS E. REILLY, JR., member, WALTER J. RYAN, JR., member, in their official and individual capacities, and

KAISER ENGINEERS, INC., and
THE BUILDING AND CONSTRUCTION TRADES COUNCIL
OF THE METROPOLITAN DISTRICT, DEFENDANTS

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND FOR MONEY DAMGES

Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC Mass"), *et al*, plaintiffs in this matter, by and through counsel, hereby file their Com-

plaint against the above-named defendants, and state as follows:

JURISDICTION

1. This is an action for damages, injunctive and declaratory relief. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331, 1343 and 2201, 15 U.S.C. § 15, and 29 U.S.C. § 1132. The rights sought to be secured in this action arise under 42 U.S.C. §§ 1983 and 1985, 15 U.S.C. § 1, *et seq.*, 29 U.S.C. § 151, *et seq.* and § 1001, *et seq.* Plaintiffs also seek to vindicate their due process and equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution. Plaintiffs also pray for relief on related state claims under the doctrine of pendent jurisdiction.

VENUE

2. The unlawful conduct and actions complained of herein have been, are being, and (absent the prayed for relief) will be committed within the District of Massachusetts, and will affect the interstate trade and commerce being conducted within the District of Massachusetts. All of the defendants, reside, do business, or may be found therein.

NATURE OF CONTROVERSY

3. The focus of this action is an unlawful bid specification which is being imposed upon all successful bidders and subcontractors on construction projects being advertised for bids in connection with the $6.1 billion Boston Harbor clean-up. The Massachusetts Water Resources Authority ("the MWRA") is requiring that all successful bidders and subcontractors agree to be bound by the Boston Harbor Wastewater Treatment Facilities Agreement (the "Agreement") which requires that such bidders and subcontractors recognize the Defendant Building Trades Council and its affiliated local unions as the exclusive representatives of all employees working on the

Harbor clean-up. The Agreement is attached hereto as Exhibit A. The Agreement further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment for their employees, including compulsory union dues, hiring halls, restrictive work rules and numerous employee benefit plans different from those presently in effect at the employers' workplaces.

4. As set forth in this Complaint, the restrictions contained in the MWRA's bid specifications are unreasonable, unlawful and anti-competitive. They constitute unlawful state regulation of private collective bargaining and employee benefits in violation of the National Labor Relations Act and the Employee Retirement Income Security Act. They deprive plaintiffs of equal protection and due process of law under the United States Constitution. They unreasonably restrict competition in violation of the antitrust laws. Finally, the MWRA's restrictions violate the Commonwealth's procurement laws and other state constitutional, statutory and common law rights of the plaintiffs.

5. Approximately 75% of all construction work in this country is performed on a non-union basis. Only 21% of all employees in the construction industry are union members. Non-union employers and employees have found that they can perform high quality construction work at lower costs, with greater flexibility and freedom than by operating under union agreements. The effect of the MWRA Agreement, however, is to force the plaintiffs and other non-union contractors to abandon those principles in order to obtain work on this Project. The anti-competitive Agreement and the specifications incorporating it into all Project advertisements for bids are contrary to the public interest and will deprive the Commonwealth of the benefits of full and open competition in the procurement process. The unlawful restrictions will cause further irreparable harm to the plain-

tiffs and their Merit Shop members by depriving them of the opportunity to participate in the largest public works project in New England history.

6. Accordingly, plaintiffs seek to enjoin enforcement of the unlawful restrictions contained in the Agreement and the bid specifications incorporating the Agreement on all contracts that have been advertised but not yet awarded and on all future construction projects connected with the clean-up of Boston Harbor. Plaintiffs do not seek in any way to delay or hinder the clean-up project itself. Plaintiffs seek only to enjoin continued enforcement of the restrictions which the MWRA, in conjunction with Kaiser and the Council, is unlawfully imposing on those who seek to participate in this important project. Plaintiffs also seek such other relief as the Court deems appropriate.

PARTIES

7. Plaintiff ABC National is a national trade association of over 18,000 merit shop construction contractors, that is, those contractors that use both union and non-union labor. Since its founding in 1950, it has been the objective of ABC National, its local chapters and their member companies to provide high quality, low cost, and timely construction work, which benefits businesses, consumers, and taxpayers.

8. Plaintiff ABC Mass is a local chapter of ABC National and is a Massachusetts non-profit corporation organized pursuant to the ABC National bylaws. ABC Mass represents over 500 contractors in Massachusetts alone. Many of ABC Mass' members perform work of the type required under the Harbor clean-up project and would bid on this project but for the unreasonable, anti-competitive and unlawful restrictions which have been imposed by defendants. ABC Mass is filing this action on behalf of its individual members who have been and will continue to be injured by the loss of business oppor-

tunity resulting from enforcement of the Agreement and the MWRA specifications.

9. Concrete Structures, Inc. ("Concrete Structures") is a Massachusetts corporation authorized to do business in Massachusetts. Fraser Engineering Company, Inc. ("Fraser Engineering") is a Massachusetts corporation authorized to do business in Massachusetts. Plumb House, Inc. ("Plumb House") is a Massachusetts corporation authorized to do business in Massachusetts. Charwill Construction, Inc. ("Charwill") is a New Hampshire corporation authorized to do business in Massachusetts. Chesterfield Associates, Inc. ("Chesterfield") is a New York corporation authorized to do business in Massachusetts. Absent the unreasonable, anti-competitive and unlawful restrictions imposed by defendants, ABC member companies including, but not limited to Concrete Structures, Fraser Engineering, Plumb House, Charwill and Chesterfield would bid on projects covered by the bid specifications which are the subject of this litigation.

10. Defendant MWRA is a body politic and corporate and public instrumentality of the Executive Office of Environmental Affairs of the State of Massachusetts created by the Massachusetts Water Resources Authority Act, Mass. Gen. Laws, c. 92, App. § 11 *et seq.* (as amended 1987) ("the MWRA Act"). The MWRA is deemed a public agency under the Act and subject to the Commonwealth's General Laws including its public bidding laws. *See* MWRA Act § 1-8(g).

11. Defendant John P. DeVillars is Chairman of the MWRA Board of Directors ("the Board"). Defendant John J. Carroll is Vice Chairman of the Board. Defendant Lorraine M. Downey is Secretary of the Board. Defendants Robert J. Ciolek, William A. Darity, Anthony V. Fletcher, Charles Lyons, Joseph A. MacRitchie, Samuel G. Mygatt, Thomas E. Reilly, Jr. and Walter J. Ryan, Jr. are Board members. Defendant Devillars is Secretary of the Executive Office of Environmental Af-

fairs of the Commonwealth of Massachusetts. The remaining Board members were appointed by the mayors of the cities and towns within the MWRA's jurisdiction. Defendant Ryan is currently Business Agent and Treasurer of Local 4 of the International Union of Operating Engineers, AFL-CIO ("Engineers Local 4") a member union of the defendant Council. Plaintiffs bring this action against the defendant Board members in both their official and individual capacities.

12. Kaiser Engineers, Inc. ("Kaiser"), is a general contractor with offices in Boston, Massachusetts. Kaiser is the "Project Contractor" under the Boston Harbor Wastewater Treatment Facilities Agreement at issue in this action.

13. The Building and Construction Trades Council of the Metropolitan District ("the Council") is a voluntary, unincorporated association whose principal place of business is located in Boston, Massachusetts. ("The Council" shall refer to both the Council itself and/or its member unions). The Council was organized and is operated as an association of labor unions for the purpose of carrying on collective bargaining and labor relations with numerous employers engaged in the construction industry in and around the Boston metropolitan area.

14. On information and belief, various other entities and individuals, not named as defendants, participated as co-conspirators with or agents of defendants in the violations alleged herein.

FACTUAL BACKGROUND

15. In 1984, the Massachusetts state legislature enacted the Massachusetts Water Resources Authority Act in order to provide water supply services and sewage collection, treatment, and disposal services to those cities and towns in the eastern half of the Commonwealth previously served by the Metropolitan District Commis-

sion. The statement of purpose of the MWRA Act references "[t]he preservation and improvement of the health, welfare, and living conditions of the citizenry, the promotion and enlargement of industry and employment and all other aspects of commerce. . . ." MWRA Act § 1-1(a).

16. The MWRA Act authorizes the MWRA to borrow up to $65 million from the Commonwealth of Massachusetts. MWRA Act § 1-5(c). The MWRA Act further provides that the Commonwealth may guarantee notes issued by the MWRA in an aggregate amount of up to $600 million. MWRA Act § 1-5(e).

17. The MWRA has received and is scheduled to receive federal monies under various grant programs as well as a special federal grant of over $100 million from the Section 513 Program. *See* The Water Quality Act of 1987, Pub. L. 100-4, 101 Stat. 7 (1987). Under the Section 513 Program, Congress earmarked federal funds for the Boston Harbor clean-up. The MWRA is also funded by sizable state grants and substantial state revenues. The bulk of the MWRA's currently scheduled construction activities will take place over the next five years. The MWRA began operations in 1985.

18. In 1983, the United States and the Conservation Law Foundation of New England, Inc. brought separate civil actions against the MWRA's predecessor, the Metropolitan District Commission ("MDC"), to compel the clean-up of Boston Harbor pursuant to the Federal Clean Water Act, 33 U.S.C. § 1251, *et seq.* ("the Clean Water Act"). The United States and the Conservation Law Foundation alleged violations of the Clean Water Act by the MDC, the Commonwealth of Massachusetts, the MWRA, and the Boston Water and Sewage Commission. By Order of this Court, it was found that the MWRA, as successor to the MDC, was liable for certain violations of the Clean Water Act. The Court also found that there

was a need for expeditious remedial action to abate the ongoing discharge of sludge and inadequately treated sewage into the Boston Harbor. Accordingly, on December 23, 1985, this Court entered an interim Order to ensure that initial steps would be undertaken to promptly abate the discharge of pollutants into the Harbor and other affected waterways. Through this December 23, 1985 Order, the Court established a schedule of remedial steps to be undertaken by the MWRA to assure compliance with the requirements of the Clean Water Act. In response to this Order, the MWRA embarked upon a multi-phase $6.1 billion, ten-year clean-up program ("the Project"). The Project is under the continuing supervision of this Court.

19. Section 1-6(g) of the MWRA Act authorizes the MWRA to engage the services of engineers, architects and other professionals. Prior to embarking upon this massive clean-up program, the MWRA appointed a Project Contractor, defendant Kaiser, to oversee the construction of new treatment facilities and the upgrading of existing facilities as required to effect the clean-up.

20. On or about November 9, 1988, Pipefitters Local 537 and Sheet Metal Workers Local 17 (both members of defendant Council) set up pickets at one or more Project work sites. This picketing resulted in a work stoppage until the picketing terminated on November 14, 1988. Thereafter, Kaiser, acting on behalf of the MWRA, negotiated with the Council and executed the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement on May 22, 1989.

21. Although the Agreement is ostensibly one between the Unions and the construction Project Contractor, Kaiser, Kaiser is expressly noted to be acting "on behalf of" the MWRA. *See* Agreement Caption, p.i., Specification 13.1, *infra*. In addition, press reports make clear that MWRA officials were actively involved in negotiating the Agreement. *See The Boston Globe*, "MWRA no-strike

pact made by unions," pp. 17, 21 (May 31, 1989), attached hereto as Exhibit B.

22. The MWRA subsequently began advertising for bids on a series of construction projects which are necessary to complete the Project. In January 1990, the MWRA was scheduled to advertise for bids on the inter-island tunnel and shafts, the effluent outfall shaft and the effluent outfall tunnel and differentials, the pilot plant, the Deer Island interim switchgear, the construction support building, road maintenance and snow removal, and the fuel depot. In February, the MWRA was scheduled to advertise for bids for power distribution, the construction water system and the construction power distribution system. This month, the MWRA is scheduled to solicit bids for construction of the on-shore marine transportation facility at Mystic River. Numerous additional projects will be bid and awarded in the months and years to come.

23. In soliciting Project bids, the MWRA has promulgated detailed specifications. Specification 13.1 of the Massachusetts Water Resources Authority Advertisement for Bids Instructions (hereinafter "Specification 13.1") provides in part:

> In the interest of [labor] harmony and the long-term supply of skilled manpower, each successful bidder and any and all levels of subcontractors, as a condition of being awarded a contract or subcontract, will agree to abide by the provisions of the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement as executed and effective May 22, 1989, by and between Kaiser Engineers, Inc., on behalf of the Massachusetts Water Resources Authority . . . A copy of the Agreement is attached and included as part of these Contract Documents. The attachments (Schedule A's and B's) are not attached to the Agreement but are incorporated by reference as if fully set forth.

Specification 13.1, attached as Exhibit C.

24. Each of the bid specifications for all Project construction contracts, including those referenced in Paragraph 22, contains the requirement that all successful bidders and subcontractors on Project work must be willing to execute and comply with the Agreement after they are awarded a construction contract. The Agreement itself states that it will be incorporated in all future Project specifications. Agreement, Art. III.

25. The Agreement which successful bidders and subcontractors are required to sign (*see* Agreement, p.1) requires, *inter alia*, that: Successful bidders under the Agreement must recognize the Council as the sole and exclusive bargaining representative of all craft employees working on facilities within the scope of the agreement. Art. III, § 1. All employees for Project work must be referred to Project contractors by local union hiring halls. Art. III, §§ 2, 3. Furthermore, all employees covered by the Agreement are subject to the unions' compulsory membership provisions and Schedules A and B of the Agreement. Art. III, § 4.

26. A prefatory Note on the cover page of the Agreement incorporates by reference all the collective bargaining agreements of the Council. Schedule A's are the local collective bargaining agreements. Schedule B's are the collective bargaining agreements covering Engineers Local 4, Laborers Local 88, and Electrical Workers Local 103. These unions have jurisdiction over Project tunnel work under the Agreement. The Agreement creates a dispute and grievance mechanism whereby aggrieved employees must seek redress through the Union. *See* Art. VII. Project employees are governed by the work rules, job classifications and wage and benefit provisions contracted for by the Council's affiliated unions. *See* Art. IX.

27. Article XI, Section 1 provides that "[t]he Contractor may utilize apprentices and such other appropriate

classifications as are contained in the applicable Schedule A or B, in a ratio not to exceed 25% of his work force by craft. . . ."

28. Article XI, Section 2 provides that any contractor awarded a Project bid "agrees to pay contributions to the established employee benefit funds in the amounts designated in the [Council member union's] Schedule A. . . ."

29. There have been no judicial or administrative hearings or findings supported by substantial evidence to the effect that non-union contractors are incapable of performing Project work in accordance with the expeditious pollution abatement mandate of the MWRA Act. There have been no findings supported by substantial evidence that the Agreement's provisions are narrowly drawn so as to avoid unnecessary interference with the rights of non-union contractors and their employees. Moreover, to the extent that any threat of "disharmony" is alleged to exist in the absence of the Agreement, such threat has arisen solely from unlawful efforts by the defendant Council to prevent non-union contractors and their employees from participating in the clean-up of the Harbor. Plaintiffs stand ready to work "in harmony" with Council members, and ABC members have performed work on thousands of public and private jobs around the country and in Massachusetts with no disruption whatsoever, on time and at low cost.

30. ABC Mass member companies, including Concrete Structures, Plumb House and companies affiliated with other ABC chapters and companies such as Charwill, Chesterfield and Fraser Engineering, are prepared to bid on one or more of the specific Harbor clean-up projects including those referenced in Paragraph 22, which have been (or will soon be) advertised for bids; these companies have not actually bid the Project because of the unreasonable restrictions incorporated in Specification 13.1, *e.g.*, that all bidders must agree to recognize the

Unions as their employees' collective bargaining representative and must agree to abide by the Agreement. One or more ABC companies is prepared to bid on much of the future work on the Boston Harbor clean-up project.

31. On September 21, 1989, plaintiff Fraser Engineering Co. filed a protest with the Massachusetts Department of Labor and Industries ("the Department") challenging the legality of the Agreement. By letter opinion dated February 16, 1990, the Department rejected the protest, upholding the validity of the Agreement. (The Department's opinion is attached hereto as Exhibit D).

32. It is clear from this opinion, and from the face of the Agreement and the specifications which have issued to date, that absent judicial relief all future projects related to the Boston Harbor clean-up will contain the restrictive Agreement-related specification (Specification 13.1).

FEDERAL CLAIMS

COUNT I

VIOLATION OF THE NATIONAL LABOR RELATIONS ACT

33. Paragraphs 1-32 are incorporated herein by reference.

34. Section 7 of the National Labor Relations Act ("NLRA") provides that "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively *through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right *to refrain from any or all of such activities . . .*" 29 U.S.C. § 157 (emphasis added). Sections 8 and 9 of the NLRA give employers the right to deal only with unions who represent a majority of their employees, and prohibit both employers and unions from interfering with employees in the exercise of their Section 7 rights.

35. Although Section 7 gives employees the right *not* to join a union and to bargain through representatives of their own choosing, the Agreement and the MWRA's bid specifications effectively require employees of ABC member companies to join a union, not of their choice, in order to work on the Project. The Agreement and bid specifications further coerce employers to abandon their Section 8 and Section 9 rights to deal only with a lawfully elected union representing a majority of the employer's employees.

36. Section 1-8(g) of the MWRA enabling Act provides that the MWRA shall be deemed a public agency. This public agency and its agent, Kaiser, have impermissiby promoted the interests of select labor organizations (those party to the Agreement) by effectively forcing all would-be Project bidders to recognize and deal with the

defendant Council's member unions in order to perform Project contracts. This action is not authorized under the NLRA, 29 U.S.C. § 151 *et seq.*, which preempts such state regulation of labor-management relations. Thus, the Agreement amounts to an impermissible attempt by the Commonwealth to promote or permit activity prohibited under the NLRA and to regulate labor relations that are beyond the Commonwealth's power to regulate under the NLRA, i.e., areas of labor conduct that Congress intended to leave unregulated.

37. The Agreement and bid specifications further result in state intrusion into substantive aspects of labor agreements and the collective bargaining process by involuntarily binding the plaintiff employers to the terms of the Agreement; these terms include, but are not limited to, a hiring hall provision, compulsory union dues and dues checkoff, grievance and binding arbitration procedures, health and welfare, pension and other trust fund contributions, apprenticeship funds and ratios, and restrictive work rules and job classifications.

38. Each of these terms and conditions of employment is a subject of bargaining under the NLRA and its subject to exclusive regulation by federal law. The Agreement impermissibly alters the balance of economic factors between non-signatory contractors and the defendant Council's member unions by requiring the contractors to accept the terms of the Agreement in order to perform work on the Project.

39. Many of plaintiffs' employees have chosen not to belong to or be represented by a labor organization. By imposing the Agreement's terms upon these employees, the defendants have deprived the plaintiffs of rights protected under the NLRA, including the right to refrain from union membership and to negotiate individual terms and conditions of employment.

40. The Agreement and bid specifications constitute impermissible state regulation of private labor relations

under Sections 7, 8 and 9 of the NLRA. Through the Agreement and Specification 13.1 the Commonwealth is affecting the substantive aspects of the free collective bargaining process to an extent forbidden by the NLRA which threatens to undermine the policies underlying the comprehensive labor relations law embodied in the NLRA.

COUNT II

VIOLATION OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

41. Paragraphs 1-40 are incorporated herein by reference.

42. The MWRA and its agent, Kaiser, through the Agreement and bid specifications, purport to require successful bidders and their subcontractors to contribute to specified employee benefit funds, including pension, annuity, health and welfare, vacation, apprenticeship and training funds and trusteed fringe benefit plans and trust agreements, and to participate in an apprenticeship program for contractor employees.

43. In order for an ABC member company to obtain an award under the Project, it would have to agree to be bound by the Agreement, including the myriad benefits, funds and programs established therein. Thus, the Agreement amounts to an attempt by the Commonwealth (through the MWRA and its agent, Kaiser) to regulate and dictate the terms of the employee benefit plans of all successful bidders on the project.

44. ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Employee benefit plans are defined as "any plan, fund, or program which . . . is hereafter established or maintained by an employer or by an employee organization, or by both, to

the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services . . . or pension plan." 29 U.S.C. § 1002 (1) (2).

45. Section 13.1 of the MWRA bid specifications and the Agreement itself clearly "relate to" employee benefits and are being imposed under color of state law. Specification 13.1 is directly inconsistent with ERISA and is, therefore, preempted.

COUNT III

VIOLATIONS OF 42 U.S.C. § 1983/EQUAL PROTECTION

46. Paragraphs 1-45 are incorporated herein by reference.

47. Plaintiffs are entitled to relief under 42 U.S.C. § 1983. Acting under color of state law, defendants engaged in conduct with the knowledge that such conduct would have the effect of denying plaintiffs' Fourteenth Amendment equal protection rights. Defendant Board members acted in both their official and individual capacities in causing these injuries.

48. In negotiating and executing the Agreement, Kaiser acted on behalf of, and as the agent of, the MWRA, a Massachusetts state authority, which subsequently incorporated the Agreement into its project bid specifications. Substantial state funds are being used to finance the Project and the Commonwealth has guaranteed repayment of notes issued by the MWRA. Both

Kaiser and the MWRA are performing functions under the Agreement that are traditionally performed by the state.

49. Although no Massachusetts law authorizes discrimination against merit shops in the procurement process underlying the Project, the Agreement and the bid specifications executed on behalf of the MWRA have the effect of precluding the award of Project work to merit shop contractors as a class. This unequal treatment is without a rational basis in that merit shop contractors possess the requisite skill, ability and integrity and are fully capable of providing the continuous, "harmonious" construction services required for a timely, thorough and cost-effective clean-up of Boston Harbor. *See* Mass. Gen. Laws Ch. 149, § 44A. No hearings were held, nor were any findings supported by substantial evidence made, to the contrary.

50. In any event, the Agreement could have been more narrowly drawn to achieve any legitimate objectives without unlawfully requiring any bidders to agree to union representation or union terms or conditions of employment.

51. As a result of the continuing arbitrary, capricious and unlawful conduct of the defendants evidenced by the Agreement and Specification 13.1, plaintiffs have sustained and continue to sustain damages resulting from the violation of their Fourteenth Amendment equal protection rights.

COUNT IV

VIOLATIONS OF 42 U.S.C. § 1983/DUE PROCESS

52. Paragraphs 1-51 are incorporated herein by reference.

53. Acting under color of state law, defendants engaged in conduct with the knowledge that such conduct

would have the effect of denying plaintiffs' Fourteenth Amendment due process rights. Defendant Board members acted in both their official and individual capacities in causing these injuries.

54. Numerous ABC member companies (and unaffiliated companies) such as Charwill, Chesterfield, Concrete Structures, Plumb House and Fraser Engineering stand ready, willing, and able to bid and to perform construction services on the Project. Because of the unreasonable restrictions imposed by the defendants, however, plaintiffs have been deprived of an opportunity to obtain work on the Project. Plaintiffs are unable to obtain the award of contracts as the lowest responsible and eligible bidders. The state action embodied in the Agreement denies plaintiffs a property interest in contract awards without due process of law in violation of the Fourteenth Amendment.

55. As a result of the continuing arbitrary, capricious and unlawful conduct of the defendants evidenced by the Agreement, plaintiffs have sustained and continue to sustain damages resulting from the violation of their Fourteenth Amendment due process rights.

COUNT V

VIOLATIONS OF ANTITRUST LAWS

56. Paragraphs 1-55 are incorporated herein by reference. The parties to the Agreement expressly note that this $6.1 billion, ten year clean-up Project "should provide significant employment opportunities for qualified residents of the area served by the [MWRA]." Agreement Art. XI, § 2.

57. Through the artifice of the Project Agreement, the Council, Kaiser, and the MWRA have entered into a conspiracy to restrain free competition and interstate commerce by imposing the Agreement on all prospective, successful construction bidders and subcontractors. The con-

spiracy manifest in the Agreement effectively excludes from the bidding process all those merit shop contractors (constituting approximately 70% of the industry) whose employees do not wish to be represented by a labor union, or who prefer to deal only with a union designated by a majority of their employees.

58. Defendants executed the Agreement as part of a general scheme to reduce competition and eliminate merit shop contractors from the Boston area. Defendants, labor and non-labor groups, at all times relevant to the allegations set forth herein were acting as the agents and or co-conspirators of each other, with a common anti-competitive purpose or design. The MWRA and Kaiser also acquiesced to threats, intimidation and coercion employed by the Council and/or its member unions to secure the Agreement. Defendants' activities and conduct have had and continue to have a substantial impact on interstate commerce in violation of 15 U.S.C. § 1.

59. The effect of defendants' unlawful conduct has been to prevent merit shop contractors from bidding the Project and thus threatens to reduce competition and substantially raise the price of the Project.

60. As a result of defendants' unlawful conduct, plaintiffs have been and will be injured in their businesses, property, and person in that they have suffered and will continue to suffer substantial injury to the goodwill of their businesses, lost business opportunities, and the loss of profits and of employment.

61. Neither the MWRA nor its agent, Kaiser, enjoy absolute or qualified immunity with respect to their participation in the anti-competitive activities described in this Complaint. The Agreement does not comport with the sovereign policies of the Commonwealth of Massachusetts. The plain language and legislative history of the MWRA enabling statute reveal the fact that the Massachusetts state legislature neither authorized nor ap-

proved the anti-competitive restrictions contained in the Agreement. *See* Statement of Purpose, MWRA Act § 1-1.

62. Section 1-8(g) of the Act provides that the MWRA shall be subject to sections 44(A)-(H) of Chapter 149 of the Massachusetts General Laws. These sections set forth the mechanisms for bidding on public projects and require that contracts be awarded to the "lowest responsible bidder". The Agreement contravenes these policies by imposing an anti-competitive restriction on the award of contracts. Thus, the MWRA's conspiratorial, anti-competitive conduct is *ultra vires* in that no state policy expressly or impliedly authorizes a "union-only" restriction on the award of contracts on this or any other public project.

63. The Agreement does not reserve to any Commonwealth officials the right to supervise the parties' conduct under the Agreement, including the right to review and disapprove anti-competitive acts committed by such parties. The presence of private interests on the Board of Directors of the MWRA, including an executive of one of the defendant Council's member unions, highlights the fact that the Agreement is not a product of considered state policy, but rather is a product of concerted anti-competitive activity instigated by the Council and or its members.

64. The Council member unions are not exempt from the antitrust laws. The Council engaged in coercive conduct and entered into a conspiracy with Kaiser and the MWRA, both non-labor organizations, in order to restrain competition by restricting the award of contracts or subcontracts to those bidders who agree to sign the Agreement. The challenged conduct was not in the unions' self-interest and was not part of a labor dispute. The Council entered into this conspiracy despite the fact that none of its member unions had a collective bargaining relationship with the MWRA, Kaiser, or with any of the plaintiffs and

neither Kaiser nor the MWRA is acting as a construction industry employer on this Project.

65. The precise amount of injury which plaintiffs have sustained and will have sustained at the time of trial cannot be presently ascertained because defendants' violations, and consequently plaintiffs' injuries flowing therefrom, are continuing.

PENDENT STATE CLAIMS

COUNT VI

VIOLATION OF MASSACHUSETTS PUBLIC BIDDING STATUTE

66. Paragraphs 1-65 are incorporated herein by reference.

67. Massachusetts Gen. Laws ch. 30, § 39M sets forth the bidding procedures for public works projects. The public building project bidding procedures are set forth in Mass. Gen. Laws Ch. 149 §§ 44A-44L. Both public statutes require that contract awards be made to the lowest responsible and eligible bidder.

68. The MWRA and its agent, Kaiser, are violating the provisions of the competitive bidding statutes by requiring that successful, non-union bidders, sign and abide by the Agreement as a prerequisite to receiving (or retaining) a contract award.

69. The MWRA's and Kaiser's actions have been arbitrary, capricious, discriminatory, and contrary to the provisions of the applicable Massachusetts bidding statutes.

70. In insisting that award recipients adhere to the Agreement, the MWRA and its Board members have acted in bad faith, abused their official power and discretion, and unlawfully promoted favoritism and collusion.

COUNT VII

MASSACHUSETTS CONSTITUTIONAL AND CIVIL RIGHTS VIOLATIONS

71. Paragraphs 1-70 are incorporated herein by reference.

72. Articles I, X, and XII of the Declaration of Rights of the Constitution of the Commonwealth of Massachusetts protect plaintiffs in the enjoyment of their liberty and property including the right to engage in their lawful occupations. Plaintiffs are also entitled to equal protection under the laws of the Commonwealth under Article X.

73. Plaintiffs' exercise and enjoyment of their rights under the constitution of the Commonwealth has been interfered with in violation of the Massachusetts Civil Rights Act, Mass. Gen. Laws Ch. 12, §§ 11H & I, in that the MWRA and Kaiser are depriving plaintiffs of the opportunity to work on the Project absent Plaintiff's willingness to sign the Agreement. In addition, the Council has intentionally interfered with plaintiffs' constitutional rights by foisting the Agreement upon the MWRA and Kaiser through threats and intimidation, in order to assure union-only performance of the Harbor clean-up. Defendants, at all times relevant to the allegations set forth herein, were acting as the agents and/or co-conspirators of each other with a common anti-competitive purpose or design. In this manner, defendants deprived plaintiffs' employees of their right to engage in their lawful occupations and deprived plaintiffs of their right to conduct their businesses.

COUNT VIII

TORTIOUS INTERFERENCE WITH ADVANTAGEOUS BUSINESS RELATIONSHIPS

74. Paragraphs 1-73 are incorporated herein by reference.

75. Defendant Council and Kaiser intentionally interfered by unlawful means with plaintiff ABC member companies' ability to form advantageous business relationships with the MWRA by procuring the MWRA's refusal to contract with plaintiffs and those similarly situated through execution of the Agreement, which violates the Massachusetts public bidding laws and unlawfully limits competition.

COUNT IX

REQUEST FOR INJUNCTIVE RELIEF

76. Paragraphs 1-75 are incorporated herein by reference.

77. Plaintiffs will suffer irreparable harm if the defendants are allowed to proceed under the Agreement.

78. Plaintiffs are not seeking to stop or delay the Boston Harbor clean-up project. Plaintiffs merely seek to enjoin enforcement of the unlawful bid specifications incorporating the unlawful Agreement, to the extent that it requires ABC member companies to recognize and deal with non-representative unions and to be bound by the terms and conditions of the union agreements; Plaintiffs also seek such other relief as the Court deems just and proper. No significant harm will result to either the public or to interested parties in the event the requested relief is granted.

79. Plaintiffs have no adequate remedy at law, and this request for injunctive relief is the only means of securing effective relief in the form of access to the construction projects required for the $6.1 billion, ten year clean-up project.

WHEREFORE, plaintiffs pray for relief as follows:

1. Money damages, including treble the amount of damages found to have been sustained by plaintiffs as a result of defendants' unlawful conduct under 15 U.S.C. § 1; and

2. Reasonable costs, interest and attorneys' fees in bringing and prosecuting this action pursuant to 42 U.S.C. § 1988, the Massachusetts Public Statute and other applicable laws; and

3. A judgment declaring that the Agreement:

(A) is null and void as preempted by the NLRA and ERISA to the extent that it requires ABC members to recognize and deal with non-majority representative unions and to be bound by the terms and conditions of employment set forth in the Agreement;

(B) works a denial of plaintiffs' rights to equal protection and due process in contravention of 42 U.S.C. § 1983 the Massachusetts Civil Rights Act, and the federal and state constitutions;

(C) is unenforceable as against the plaintiffs and ABC member companies;

(D) is violative of Massachusetts procurement regulations; and

4. A preliminary and permanent injunction against the defendants and their agents, employees, successors, attorneys, and all those acting in concert or in participation with them, prohibiting enforcement against plaintiffs or other ABC member companies of bid Specification 13.1 and those portions of the Agreement which would require plaintiffs to recognize or deal with any union or to adhere to any collectively bargained terms or conditions of employment; and

5. Such other relief as the Court deems appropriate.

PLAINTIFFS HEREBY DEMAND A TRIAL BY JURY ON ALL ISSUES TRIABLE TO A JURY IN THIS MATTER.

Respectfully Submitted,

ASSOCIATED BUILDERS AND CONTRACTORS, *et al.* OF MASSACHUSETTS/ RHODE ISLAND

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Dated: March 5, 1990

EXHIBIT B

Boston Globe
May 31, 1989

MWRA NO-STRIKE PACT
MADE BY UNIONS

By Peter J. Howe
Globe Staff

The Massachusetts Water Resources Authority and 31 construction unions yesterday announced an agreement to ban strikes and avoid labor unrest during the decade-long harbor-cleanup project.

The agreement was hailed by both sides as a landmark accomplishment in labor relations that will prevent delays and cost overruns in the $6.1 billion project. But the pact makes only a vague commitment to expanding the project's job opportunities for minorities and women.

In a related development yesterday, Mayor Flynn called on the state to earmark one-third to one-half of the trainee jobs in the harbor-cleanup and Central Artery-third tunnel construction projects for those he called disadvantaged young adults aged 18 to 29.

After heavy lobbying from Flynn, artery-tunnel officials last month agreed to reserve 25 percent of the apprentice jobs for people in each of three categories: women, minorities and Boston residents. Flynn now says the state needs to target the construction job opportunities more directly "toward young people caught in the cycle of poverty." Flynn said the state's three affirmative-action categories may not reach those most in need.

The MWRA labor-harmony pact, announced at a State House news conference, bans strikes or slowdowns by the

unions and lockouts by contractors. It will prevent work stoppages during the five contract renegotiations that will occur during the life of the project.

The agreement sets standard procedures for working conditions, including paying workers an extra hour's pay for the time they spend traveling from shore to construction sites at Deer Island and elsewhere.

Also, the former US secretary of labor, John Dunlop, has been appointed as arbitrator to resolve disputes among trade unions and between the MWRA and organized labor.

Minorities express concern

However, some minority leaders expressed concern that the new MWRA pact has none of the specific guarantees —like those made for the $4.4 billion artery-tunnel project—reserving jobs for minorities and women.

Asked about the MWRA agreement, Joseph W. Nigro, secretary-treasurer of the Building Trades Council, said: "There are no numbers on this contract."

But MWRA executive director Paul F. Levy said the agreement "establishes the commitment of the MWRA and the building trades to work together on that agreement.

Levy said specific numerical targets will be announced in several months. He said: "The kinds of numbers the Central Artery is talking about is what we're looking towards."

Rep. Gloria Fox (D-Roxbury) last night expressed concern that the MWRA has not yet offered detailed affirmative-action promises.

"We need to make sure we have as much as we can in print, because our concern is that we're really going to fall behind on the hiring of African-American men and women on this project," Fox said.

Levy said the artery-tunnel goals cannot be the same as those for the harbor cleanup because all the artery work is occurring within Boston neighborhoods while the MWRA serves 42 cities and towns and will have major construction in communities other than Boston.

All unions signed

Nigro said all unions that will be working on the project—which includes construction of the world's second-largest sewage-treatment plant and 14 miles of tunnels under Boston Harbor—have signed the no-strike pledge. The agreement holds through 1999.

Nigro acknowledged that the plan does involve major concessions by the trade unions, particularly the no-strike clause. But, he said, the unions believe they will benefit from the "10 years of stability," allowing them to make long-term plans for recruiting and training new members.

Arthur Osborn, the executive secretary of the Greater Boston Labor Council, said, "I agree it's a landmark. Ten years of labor harmony is certainly a step in the right direction."

Levy called the agreement a major cost-cutting success because every week of delay on the project increases the cost by $2 million.

The agreement does not exclude non-union contractors from bidding for MWRA work. However, they must abide by union pay scales and work rules, and their employees working on MWRA projects must join a trade union within seven days, MWRA officials said.

Flynn, in his critique of state plans, said the state's commitment of $1 million to artery-tunnel training programs "seems meager relative to the scope of the projects." The mayor proposed a mega-projects training

academy to be set up at the underused Humphrey Occupational Resource Center in Roxbury.

The state secretary of economic affairs, Grady B. Hedgespeth, last night called Flynn's ideas "very constructive suggestions." Hedgespeth said he is "very pleased with the tone the mayor is taking," after Flynn made several harshly worded criticisms of state proposals.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF DICK ANDERSON

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am president of Plumb House, Inc. ["the Company"].

3. The Company is a contractor incorporated in Massachusetts and is authorized to do business in the Commonwealth of Massachusetts. The Company is an ABC Mass member company which pays annual dues for ABC's services.

4. The Company is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of the Company's employees as their representative.

5. The Company has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). The Company stands ready, willing, and able to bid and perform on a number of Project contracts, including those requiring a roofing, carpentry, or concrete contractor.

6. The Company has not bid on any Project contracts because the Boston Harbor Waste Water Treatment

Facilities Project Labor Agreement ("the Agreement") is incorporated by reference in all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all the Company's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at the Company's work sites.

10. The Company has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, the company does not wish to deal with any bargaining representative not designated by the Company's own employees. The Company also does not wish to have its employees compelled to join a union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various

benefit funds required by the Agreement, nor to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. The Company and its employees have in the past and are now willing and able to work in harmony with union and non-union contractors and their employees.

13. The Company provides employee benefits that differ from the employee benefit plans required under the Agreement.

14. Bid specification 13.1 places the Company at a competitive disadvantage by requiring the Company to deviate from its established employment practices, compels the Company to give up its right to deal only with a union designated by a majority of its employees, and compels the Company to adopt state-imposed employee benefit plans different from its own. Thus, the bid specification effectively prevents the company from bidding the Project.

15. The Company has suffered and will continue to suffer the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project, absent relief from the requirements of bid specification 13.1.

I affirm, under penalty of perjury, that the foregoing is true to the best of my knowledge, information and belief.

DICK ANDERSON
President
Plumb House, Inc.

Subscribed and sworn to before me, a Notary Public for the Commonwealth of Massachusetts, the —— day of ————, 1990.

Notary Public
My Commission Expires: ———

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF F. LESTER FRASER

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am president of Fraser Engineering Company, Inc. ["the Company"].

3. The Company is a contractor incorporated in Massachusetts and is authorized to do business in the Commonwealth of Massachusetts.

4. The Company is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of the Company's employees as their representative.

5. The Company has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). The Company stands ready, willing, and able to bid and perform on a number of Project contracts, including those requiring a mechanical, HVAC, plumbing, electrical or sprinkler contractor.

6. The Company has not bid on any Project contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference in all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all the Company's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at the Company's work sites.

10. The Company has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, the Company does not wish to deal with any bargaining representative not designated by the Company's own employees. The Company also does not wish to have its employees compelled to join a union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, nor to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. The Company and its employees have in the past and are now willing and able to work in harmony with union and non-union contractors and their employees.

13. The Company provides employee benefits that differ from the employee benefit plans required under the Agreement.

14. Bid specification 13.1 places the Company at a competitive disadvantage by requiring the Company to deviate from its established employment practices, compels the Company to give up its right to deal only with a union designated by a majority of its employees, and compels the Company to adopt state-imposed employee benefit plans different from its own. Thus, the bid specification effectively prevents the company from bidding the Project.

15. The Company has suffered and will continue to suffer the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project, absent relief from the requirements of bid specification 13.1.

I affirm, under penalty of perjury, that the foregoing is true to the best of my knowledge, information and belief.

/s/ F. Lester Fraser
F. LESTER FRASER
President
Fraser Engineering Company, Inc.

Subscribed and sworn to before me, a Notary Public for the Commonwealth of Massachusetts, this 1st day of March, 1990.

/s/ Harry L. Fraser
Notary Public
My Commission Expires: 12-4-92

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF C. W. H. LOWTH, JR.

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am president of Charwill Construction, Inc. ["the Company"].

3. The Company is a contractor incorporated in New Hampshire and is authorized to do business in the Commonwealth of Massachusetts. The Company is an ABC Mass member company which pays annual dues for ABC's services.

4. The Company is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of the Company's employees as their representative.

5. The Company has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). The Company stands ready, willing, and able to bid and perform on a number of Project contracts, including those requiring a contractor who specializes in water and sewage treatment plant construction and rehabilitation.

6. The Company has not bid on any Project contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference in all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all the Company's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at the Company's work sites.

10. The Company has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, the Company does not wish to deal with any bargaining representative not designated by the Company's own employees. The Company also does not wish to have its employees compelled to join a union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, nor to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. The Company and its employees have in the past and are now willing and able to work in harmony with union and non-union contractors and their employees.

13. The Compay provides employee benefits that differ from the employee benefit plans required under the Agreement.

14. Bid specification 13.1 places the Company at a competitive disadvantage by requiring the Company to deviate from its established employment practices, compels the Company to give up its right to deal only with a union designated by a majority of its employees, and compels the Company to adopt state-imposed employee benefit plans different from its own. Thus, the bid specification effectively prevents the company from bidding the Project.

15. The Company has suffered and will continue to suffer the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project, absent relief from the requirements of bid specification 13.1.

I affirm, under penalty of perjury, that the foregoing is true to the best of my knowledge, information and belief.

/s/ C. W. H. Lowth, Jr.
C. W. H. LOWTH, JR.
President
Charwill Construction, Inc.

Subscribed and sworn to before me, a Notary Public for the State of Texas, this 2nd day of March, 1990.

/s/ Faye Schaper
Notary Public
My Commisison Expires:
6-22-91

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF DANIEL J. BENNET

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am Executive Vice President of Associated Builders and Contractors, Inc. ("ABC National").

3. Founded in 1950, ABC is a national construction trade association representing over 18,000 member companies in 80 local chapters across the country with over 1 million employees who believe in the merit shop philosophy, *i.e.*, that construction jobs should be awarded to the lowest responsible bidder regardless of labor affiliation. Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC Mass") is one of ABC's local chapters.

4. Although, most of ABC's member companies are not signators to collective bargaining agreements with any unions, they hire employees regardless of whether they are union members or independent craft people. ABC member companies subcontract work to other companies based on the lowest responsible bid, regardless of whether a subcontractor may be open shop or union-affiliated.

5. ABC's merit shop philosophy is founded upon a number of basic tenants [*sic*], including the view that all

construction contracts—public and private—should be awarded to the lowest responsible bidder, regardless of a labor affiliation, through open and competitive bidding. This practice provides taxpayers and consumers with the most value for their construction dollar. ABC espouses the view that every worker in a merit shop company should be paid and promoted based on his or her skills, initiative and desire for individual accomplishment and that union and non-union companies can, and should, work cooperatively on the same jobsite. ABC member companies and their employees are willing and able to work in harmony with union and non-union contractors and their employees and have done so on thousands of projects both public and private across the country.

6. Approximately seventy-five percent of all industrial construction and maintenance work in the United States is performed on a merit shop basis. Union membership as a percentage of the construction industry has steadily declined to the point today that union membership comprises only 21% of the construction work force across the United States.

7. In exchange for dues payments by local chapters, ABC offers its members and their employees a number of services. For example, ABC has established the only construction Safety Management Academy in the construction industry. Registration for the academy is open to all who can benefit from the educaton programming including open shop, closed shop and non-members. In addition, ABC offers a Project Managers Academy, a Supervisor's Academy and a comprehensive Apprenticeship Training Program.

8. ABC believes that government at the national, state and local levels has an obligation to operate with a sense of fiscal accountability, and that it is in the public interest to insure that government contracts are awarded to the lowest responsible bidder—a practice that assures the tax-

payer of getting the best possible product for his tax dollar.

9. ABC companies have successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project. These contractors stand ready, willing, and able to bid and perform on a number of Project contracts.

10. For projects like the Boston Harbor clean-up, ABC member contractors can save as much as 20% on labor costs as compared to union contractors, absent the restrictions imposed by the Agreement. These savings are a product of the fact that ABC contractor employees have greater flexibility with respect to their work rules and hours and with respect to their job classifications. These savings enable ABC contractors to successfully bid projects such as the Harbor clean-up Project even though the wage structure is established for all workers by the Commonwealth.

11. ABC member contractors have been deterred from bidding on any Harbor clean-up contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference into all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

12. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all ABC member employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

13. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on

the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

14. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at ABC company work sites.

15. Among other reasons for ABC member companies' refusal to bid the Project absent an injunction with respect to Specification 13.1, is that ABC member companies do not wish to deal with any bargaining representative not designated by the company's own employees. Additionally, ABC companies do not wish to have their employees compelled to join a union against their will, to hire their employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, or to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

16. Specification 13.1 places ABC member companies at a competitive disadvantage by requiring them to deviate from their established employment practices. ABC provides numerous employee benefits that differ from the employee benefit plans required under the Agreement. For example, although ABC has its own apprenticeship program for member contractor employees, Specification 13.1 would require that these employees participate in the Council's apprenticeship program. ABC employees would thus receive different training than that provided by the ABC apprenticeship program and other ABC programs. Specification 13.1 also compels ABC companies to give up their right to deal only with a union designated by a

majority of their employees. Adherence to the Agreement would require that ABC companies contribute to different benefit and trust funds over which the ABC companies and their employees would have no control and from which they would derive no benefit. ABC would have to administer two sets of compensation schedules. The mandatory union hiring hall would deny ABC companies the right to choose the men and women that they would like to employ, while denying these employees the right to choose whether or *not* to join a union. The terms of the Agreement reached between the MWRA and Kaiser and the Council may suit the interests of the minority of the construction industry represented by the Council's unions, but such Agreement does not serve the interests of the public or of ABC member companies.

17. ABC companies have been injured and, absent relief from the requirements of Specification 13.1 will continue to be injured by this specification. Such injury includes the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project.

I affirm that I have read the foregoing and that it is true and accurate.

/s/ Daniel J. Bennet
DANIEL J. BENNET
Vice President
Associated Builders and
Contractors, Inc.

Subscribed and sworn to before me, a Notary Public for the District of Columbia, this 2nd day of March, 1990.

/s/ Rosita L. Howell
Notary Public

My Commission Expires:
July 1, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF GERALD W. KRIEGEL

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am president of Concrete Structures, Inc. ["the Company"].

3. The Company is a contractor incorporated in Massachusetts and is authorized to do business in the Commonwealth of Massachusetts. The Company is an ABC Mass member company which pays annual dues for ABC's services.

4. The Company is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of the Company's employees as their representative.

5. The Company has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). The Company stands ready, willing, and able to bid and perform on a number of Project contracts, including those requiring a structural contractor with expertise in precast and prestressed concrete.

6. The Company has not bid on any Project contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference in all bid specifications issued

by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all the Company's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at the Company's work sites.

10. The Company has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, the Company does not wish to deal with any bargaining representative not designated by the Company's own employees. The Company also does not wish to have its employees compelled to join a union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, nor to otherwise be bound to

the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. The Company and its employees have in the past and are now willing and able to work in harmony with union and non-union contractors and their employees.

13. The Company provides employee benefits that differ from the employee benefit plans required under the Agreement.

14. Bid specification 13.1 places the Company at a competitive disadvantage by requiring the Company to deviate from its established employment practices, compels the Company to give up its right to deal only with a union designated by a majority of its employees, and compels the Company to adopted state-imposed employee benefit plans different from its own. Thus, the bid specification effectively prevents the company from bidding the Project.

15. The Company has suffered and will continue to suffer the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project, absent relief from the requirements of bid specification 13.1.

I affirm, under penalty of perjury, that the foregoing is true to the best of my knowledge, information and belief.

/s/ Gerald W. Kriegel
GERALD W. KRIEGEL
President
Concrete Structures, Inc.

Subscribed and sworn to before me, a Notary Public for the Commonwealth of Massachusetts, this —— day of ————, 1990.

_____

Notary Public

My Commission Expires:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF NOEL (ROBERT J.) LEARY

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am Executive Vice President of Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. ("ABC Mass").

3. ABC Mass is a local chapter of Associated Builders and Contractors, Inc. comprised of over 600 construction compaines in Massachusetts and Rhode Island (over 500 in Massachusetts alone) who believe in the merit shop philosophy, *i.e.*, that construction jobs should be awarded to the lowest responsible bidder regardless of labor affiliation.

4. Although ABC Mass' member companies are generally not signators to collective bargaining agreements with any unions, they hire employees regardless of whether they are union members or independent craft people. ABC Mass member companies subcontract work to other companies based on the lowest responsible bid, regardless of whether a subcontractor may be open shop or union-affiliated.

5. ABC National and ABC Mass (collectively "ABC") share the merit shop philosophy which is founded upon a number of basic tenets, including the view that all con-

struction contracts—public and private—should be awarded to the lowest responsible bidder, regardless of labor affiliation, through open and competitive bidding. This practice provides taxpayers and consumers with the most value for their construction dollar. ABC Mass, like ABC National, espouses the view that every worker in a merit shop company should be paid and promoted based on his or her skills, initiative and desire for individual accomplishment and that union and non-union companies can, and should, work cooperatively on the same jobsite.

6. Today over 60% of the construction projects in the MWRA service area are performed on a merit shop basis. ABC Mass member companies and their employees are willing and able to work in harmony with union and non-union contractors and their employees and have done so on hundreds of projects both public and private in Massachusetts and Rhode Island.

7. In exchange for dues payments by local chapters, ABC offers its members and their employees a number of services. For example, ABC has established the only construction Safety Management Academy in the construction industry. Registration for the academy is open to all who can benefit from the education programming including open shop, closed shop and non-members. In addition, ABC offers a Project Managers Academy, a Supervisor's Academy and a comprehensive Apprenticeship Training Program.

8. Both ABC Mass and ABC National believe that government at the national, state and local levels has an obligation to operate with a sense of fiscal accountability, and that it is in the public interest to insure that government contracts are awarded to the lowest responsible bidder—a practice that assures the taxpayer of getting the best possible product for his tax dollar.

9. ABC Mass companies have successfully completed a number of projects similar to those called for under

the Boston Harbor Clean-Up Project. These contractors stand ready, willing, and able to bid and perform on a number of Project contracts.

10. For projects like the Boston Harbor clean-up, ABC Mass member contractors can save as much as 20% on labor costs as compared to union contractors, absent the restrictions imposed by the Agreement. These savings are a product of the fact that ABC contractor employees have greater flexibility with respect to their work rules and hours and with respect to their job classifications. These savings enable ABC Mass contractors to successfully bid projects such as the Harbor clean-up Project even though the wage structure is established for all workers by the Commonwealth.

11. ABC Mass member contractors have been deterred from bidding on any Harbor clean-up contracts because the Boston Harbor Waste Water Treatment Facilities Project Labor Agreement ("the Agreement") is incorporated by reference into all bid specifications issued by the Massachusetts Water Resources Authority ("the MWRA") via specification 13.1 of the Instructions to Bidders ("Specification 13.1").

12. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all ABC Mass member employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

13. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to

the select union's compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

14. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at ABC Mass company work sites.

15. Among other reasons for ABC Mass member companies' refusal to bid the Project absent an injunction with respect to Specification 13.1, is that ABC Mass member companies do not wish to deal with any bargaining representative not designated by the company's own employees. Additionally, ABC Mass companies do not wish to have their employees compelled to join a union against their will, to hire their employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, or to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

16. Specification 13.1 places ABC Mass member companies at a competitive disadvantage by requiring them to deviate from their established employment practices. ABC provides numerous employee benefits that differ from the employee benefit plans required under the Agreement. For example, although ABC has its own apprenticeship program for member contractor employees, Specification 13.1 would require that these employees participate in the Council's apprenticeship program. Employees of ABC Mass would thus receive different training than that provided by the ABC apprenticeship program and other ABC programs. Specification 13.1 also compels ABC companies to give up their right to deal only with a union designated by a majority of their employees. Adherence to the Agreement would require that ABC Mass companies contribute to different benefit

and trust funds over which the ABC Mass companies and their employees would have no control and from which they would derive no benefit. ABC companies would have to administer two sets of compensation schedules. The mandatory union hiring hall would deny ABC Mass companies the right to choose the men and women that they would like to employ, while denying these employees the right to choose whether or *not* to join a union. The terms of the Agreement reached between the MWRA and Kaiser and the Council may suit the interests of the minority of the construction industry represented by the Council's unions, but such Agreement does not serve the interests of the public or of ABC Mass member companies.

17. ABC Mass companies have been injured and, absent relief from the requirements of Specification 13.1 will continue to be injured by this specification. Such injury includes the loss of significant business opportunities represented by the contracts awarded and contracts to be awarded under the $6.1 billion Project.

I affirm under penalties of perjury that I have read the foregoing and that it is true and accurate.

/s/ Noel (Robert J.) Leary
NOEL (ROBERT J.) LEARY
Executive Director
Associated Builders and
Contractors of Massachusetts/
Rhode Island, Inc.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF GILBERT W. SIMMERS, JR.

Affiant, being first duly sworn, deposes and says as follows:

1. I have personal knowledge of the facts set forth herein and am competent to testify thereto.

2. I am Vice President of Chesterfield Associates, Inc. ("Chesterfield").

3. Chesterfield is a general contractor incorporated in New York and authorized to do business in the Commonwealth of Massachusetts. Chesterfield is a member of the Empire State Chapter of Associated Builders and Contractors, Inc. which pays annual dues for ABC National's services.

4. Chesterfield is not presently a party to a collective bargaining agreement with any labor organization nor has any such organization been designated by a majority of Chesterfield's employees as their representative.

5. Chesterfield has successfully completed a number of projects similar to those called for under the Boston Harbor Clean-Up Project ("the Project"). Chesterfield stands ready, willing, and able to bid and perform on a number of Project contracts requiring waterfront construction and site development, including those requiring steel sheathing work for wharves and dock construction.

6. Chesterfield has not bid on any Project contracts because the Boston Harbor Waste Water Treatment

Facilities Project Labor Agreement ("the Agreement) is incorporated by reference in all bid specifications issued by the Massachusetts Water Resources Authority via Specification 13.1.

7. Specification 13.1 requires that successful bidders must be willing to execute and comply with the Agreement after they are awarded a construction contract. Moreover, the Agreement provides that it will be incorporated into *all* future Project specifications. Under Specification 13.1, all Chesterfield's employees would be governed by the wage and benefit provisions negotiated by the Council, the MWRA and Kaiser Engineers, Inc.

8. Specification 13.1 requires that successful bidders recognize particular unions as the sole and exclusive bargaining representative of all craft employees working on the Project, that all employees for Project work must be referred to contractors by local union hiring halls, that all employees covered by the Agreement are subject to the select unions' compulsory membership provisions, and that aggrieved employees must seek redress through the unions named in the Agreement.

9. Specification 13.1 further requires that bidders and subcontractors agree to be bound by numerous terms and conditions of employment negotiated by the Council, including compulsory union dues and employee benefit plans different from those presently in effect at Chesterfield's work sites.

10. Chesterfield has not bid for any contracts advertised by the MWRA because of these and other similarly restrictive requirements incorporated in all bid specifications through Specification 13.1.

11. Among other reasons, Chesterfield does not wish to deal with any bargaining representative not designated by Chesterfield's own employees. Chesterfield also does not wish to have its employees compelled to join a

union against their will, to hire its employees exclusively from a union hiring hall, to contribute to various benefit funds required by the Agreement, nor to otherwise be bound to the numerous restrictive terms and conditions of employment spelled out in the Agreement.

12. Chesterfield and its employees are willing and able to work in harmony with union and non-union contractors and their employees. Chesterfield workers have worked alongside union workers on many occasions without difficulty.

13. Although Chesterfield provides training for its employees, Specification 13.1 would require that the company's employees participate in the Council's apprenticeship program.

14. Chesterfield provides numerous employee benefits that differ from the employee benefit plans required under the Agreement.

15. Bid Specification 13.1 places Chesterfield at a competitive disadvantage by requiring Chesterfield to deviate from its established employment practices, compels Chesterfield to give up its right to deal only with a union designated by a majority of its employees, and compels Chesterfield to adopt state-imposed employee benfit plans different from its own. Thus, the Specification 13.1 effectively prevents the company from bidding the Project.

16. Chesterfield has suffered and, absent relief from the requirements of bid Specification 13.1, will continue to suffer the loss of significant business opportunities represented by the marine construction and site development contracts awarded and to be awarded under the $6.1 billion Project.

I affirm, under penalty of perjury, that I have read the foregoing and that it is true and accurate.

Gilbert W. Simmers, Jr.
Vice President
Chesterfield Associates, Inc.

Subscribed and sworn to before me, a Notary Public for the Commonwealth of Massachusetts, this —— day of ————, 1990.

_____

Notary Public

My Commission Expires:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF RICHARD D. FOX

Richard D. Fox, first being duly sworn, deposes and says as follows:

1. I am the Director of the Program Management Division ("PMD") of the Massachusetts Water Resources Authority ("Authority" or "MWRA"). In that capacity, I am responsible for the overall direction and implementation of the Authority's activities pertaining to the Boston Harbor clean-up. In this capacity I have personal knowledge and information of those matters set forth in this affidavit except as otherwise noted.

2. I hold a degree in civil engineering and I am a registered Professional Engineer. I am also an attorney admitted to the Bar in Massachusetts and Wisconsin. I have extensive experience in the management of a large variety of construction related projects.

3. As Director of PMD, I was directly involved in the decision-making process which led MWRA to approve the negotiation of a Projcet Labor Agreement by its program manager/construction manager Kaiser Engineers, Inc. ("Kaiser") for the Boston Harbor Project, and to subsequently recommend Board approval of the results of that negotiation. The decision to approve Kaiser's suggestion of the negotiation of a Project Labor Agreement, which would maintain worksite harmony, labor-management peace, and stability during the course of MWRA's Boston Harbor Project, was made against the backdrop of numerous incidents and a variety of considerations.

4. The Authority was created to operate, regulate, finance, rehabilitate and modernize the Boston area's waterworks and sewage systems and to investigate, design and construct additions to the systems. Soon thereafter, the new Authority was named as a defendant in a federal court lawsuit by the U.S. Environmental Protection Agency, which alleged that sewage was being discharged into Boston Harbor, in violation of the Federal Clean Water Act. In September, 1985, the United States District Court for the District of Massachusetts ruled that the discharges did violate the Act's provisions and subsequently, on May 8, 1986, issued a comprehensive "Long-Term Scheduling Order" containing numerous milestones for the completion of the many different components of the Boston Harbor clean-up program. The construction of Deer Island wastewater treatment facility is being undertaken by the Authority in order to comply with this order. The order required the Authority to construct a large primary and secondary wastewater treatment plant and ancillary facilities on Deer Island by the year 1999. Failure to comply with this schedule will subject the Authority and its ratepayers to risk of substantantial fines and other remedies. A true and accurate copy of the current court-ordered schedule (now known as and hereinafter referred to as "Schedule Three") is attached as Exhibit "A". Schedule 3 did not take into consideration what I believed to be numerous factual circumstances inherent to the Project which significantly raise the potential for delay and added expense as the result of labor disputes. The principal factors not considered was the delays which could result from labor unrest. Yet the potential for unrest is real, as well as a number of other labor related factors, which could result in delay, and therefore the P/CM (Kaiser) was requested to develop an assessment of and plan to resolve these labor factors to avoid delay.

5. The simple fact that the Project will require the utilization of dozens of different contractors, many dif-

ferent Building Trade skills, and the fact that a substantial portion of the construction industry in the Eastern Massachusetts area for large scale projects is organized, will result in hundreds of labor negotiations over the ten year life of the Project. Each could delay the Project if they result in a work stoppage. It is the nature of the construction industry that each skilled trade negotiates a local area agreement with a group of contractors, and the MWRA as the owner, would ordinarily have no impact on those negotiations. Thus, if the local contractors and/or the union determine that a strike or lock-out was appropriate to enforce its negotiating position, the result could be a withdrawal of construction services on the Harbor Project. Additionally, I understand that unions have a legal right to picket for informational and/or area standards purposes, and union members have a legal and protective right not to cross those picket lines to go to work or to make deliveries. Again, considering the geographic structure of the Project, as described below, this valid and legal activity raised concerns in my mind concerning the ability to meet the court mandated schedule.

6. From 1987 through 1989, the performance of critical construction contracts at MWRA's wastewater collection and treatment facilities was on numerous occasions disrupted by labor unrest. These disruptions quickly demonstrated the importance of maintaining labor harmony within the workforces of the many MWRA contractors working on those construction projects. These disruptions caused particular concern when they arose at Deer Island, which is a 215.7 acre site at the end of a peninsula adjoining the Town of Winthrop. Deer Island is connected to the mainland only by a single narrow roadway, so that any picketing conducted at its main gate could and in fact did cause work stoppages to occur throughout Deer Island. Such stoppages jeopardized MWRA's ability to comply with the dealines set forth in Schedule 3. Additionally,

such stoppages gave rise to delays in MWRA's construction activities which could have frustrated its interim efforts to ameliorate or abate certain wastewater discharges into Boston Harbor, thereby prolonging environmental harm to important natural resources in Boston's Inner Harbor and Dorchester Bay.

7. An example of such a stoppage occurred during the performance by the Barletta Co., Inc. ("Barletta") of a $6,000,000 construction contract at Deer Island. This contract, which was critical to MWRA's Boston Harbor clean-up efforts, was a public works construction project within the meaning of M.G.L. c.149 and was subject to its filed sub-bidder provision. Merrimack Valley Mechanical Contractors ("MVMC") had been designated the low-qualified statutory sub-bidder for this contract and therefore became a sub-contractor to Barletta. MVMC did not have a collective bargaining relationship with Pipefitters Local 537 ("Local 537") or the Sheet Metal Workers Local 17 (Local 17). On November 9, 1988, Local 537 and Local 17 engaged in picketing at the main gate to Deer Island, objecting to the use of the non-union sub-contractor and demanding the use of union labor on all aspects of the contract. Because all unionized workers observed the picket line, construction work at Deer Island came to a virtual standstill.

8. MWRA encountered similar challenges at Deer Island and at other facilities:

(a) Informational picketing was threatened by Local 22 in August 1988, at MWRA's scum management project job site on Deer Island, based on the union's assertion that certain work being performed by non-union technical personnel rightfully belonged to its membership.

(b) Informational picketing at MWRA's Chelsea Creek Headworks occurred in late 1988, with Roofers Local 33 protesting that, due to the pres-

ence of non-union construction workers on the jobsite, "community standards" were not being observed during the rehabilitation of that facility.

(c) Carpenters and Piledrivers Local 56 conducted informational picketing at a non-union separate gate established at the entrance to Nut Island in April and May, 1989, alleging that union work on an on-shore pier piledriving project was being performed by non-union workers where MWRA's Nut Island Sewerage Treatment Plant is located. Local 56 complained that the separate gate system was not being strictly observed and at one point threatened to extend its picketing to the union gate; such an extension did not occur. The complaints of Local 56 did, however reflect the limited effectiveness of separate gate systems. Non-union workers did on occasion pass through, as did the Contractor's equipment thereby tainting, the union gate. Because of space constraints existing at the entrance to Nut Island, it was impossible to arrange separate gates large enough to accommodate union and non-union trucks and other pieces of large construction equipment.

(d) Informational picketing was conducted by IBEW Local 103 at the entrance gateway to Deer Island in March, 1989, based on its allegations that a non-union electrician, Aerial Electric, under contract with the City of Boston to provide services as needed at the Deer Island House of Correction, engaged in unfair labor practices. This picketing occurred for two days even though Aerial was not then engaged in any activities on Deer Island. Although MWRA had no relationship with Aerial, its construction activities on Deer Island were adversely impacted by the

picketing, inasmuch as many of MWRA's construction contractors' union employees honored the picket line.

9. These incidents as well as the inherent factors recited in ¶ 5 gave rise to grave concerns among MWRA staff that labor relations disputes would significantly hamper MWRA's performance of its mission to conduct the Boston Harbor Project. These concerns were communicated to and shared by MWRA's Board of Directors. These concerns grew deeper as MWRA moved to implement a provision of its mitigation agreement with the Town of Winthrop designed to minimize the impact of MWRA construction activities at Deer Island by limiting the volume of vehicle traffic passing through the community to Deer Island. Under that provision, MWRA agreed that it would:

(a) transport all bulk materials, including earth, gravel and reinforcing steel, to and from the site by barge;

(b) use all roll-on/roll-off transport for heavy trucking; and

(c) transport workers to the construction site bus and ferry, with at least 50% of the workers being transported by ferry.

MWRA has selected four locations around the harbor for facilities to transport construction workers to Deer Island; Squantum Point in Quincy; Rowes Wharf in Boston; Beverly Street, behind Boston's North Station; and a site on the Mystic River in the Charlestown/Everett area. Construction materials and equipment are to be shipped to Deer Island from MWRA's Fore River Staging Area in Quincy; this site, formerly the General Dynamics Shipyard, was acquired by MWRA in August, 1987. Additionally, workers are transported by bus to Deer Island from a portion of the Suffolk Downs property in Revere which is under lease to MWRA. The an-

ticipated use of these facilities and modes of transportation raised additional construction labor relations issues which, if not resolved, posed further threats to the maintenance of labor harmony. For example, it was unclear where job site entrances, for purposes of erecting separate gates, would be: would they be at the entrance to each MWRA transportation facility, at the entryway to each ferry or bus, or at the actual entrance to the site of construction? Given the close proximity of workers on ferries and buses, would two sets of buses and ferries, one union and the other non-union, be necessary? Furthermore, WMRA staff was concerned that maritime union workers needed for the transportation of construction workers to the Deer Island construction site might object to the involvement of non-union tradesmen in the project.

10. During the Fall of 1988, and the Winter of 1988-89, Kaiser recommended to me and my staff that a Project Labor Agreement could provide the framework to solve the concerns which I had regarding potential delays. Although it was noted to me that a Project Labor Agreement had never been negotiated in Suffolk County, Kaiser believed that there was a reasonable probability that a Project Agreement could be negotiated. Based on Kaiser's recommendation, we authorized the development of a program leading to negotiations. We advised Kaiser that we could not be committed to any Agreement until we saw its results, particularly because of our concern that any Agreement be an across-the-board document providing disputes resolution procedures for all possible disputes, resolving issues relating to differences in travel pay, and a number of other concerns which we felt needed to be resolved so that we could be assured of labor harmony and stability on the Project.

11. Accordingly, Kaiser entered negotiations on a Project Labor Agreement for the Boston Harbor Project in 1989. These negotiations were conducted with: repre-

sentatives of the Building and Construction Trades Council of the Metropolitan District and its affiliated local unions; Local 52, Bricklayers; Local 424, Carpenters; Local 133, Laborers; and the Building and Construction Trades Department, AFL-CIO and its affiliated international unions and their affiliated local unions (collectively, "the unions"). As the result of these negotiations, Kaiser and the unions entered into the Boston Harbor Wastewater Treatment Facilities Project Labor Agreement ("the Agreement") on May 22, 1989.

12. The most significant provisions of the Agreement with regard to its ability to achieve labor harmony are:

(a) standardization of certain working conditions for all construction employees, notably, working hours and travel pay;

(b) a 10-year no-strike guarantee by the unions; and

(c) the establishment of procedures to resolve quickly and efficiently any type of dispute that may arise on the Boston Harbor Project.

13. I believe that it would be impossible to maintain jobsite labor harmony in the performance of the Boston Harbor Project without the Agreement and that any action which either temporarily or permanently suspended or overturned the terms of the Agreement would cause the Authority irreparable harm. This belief is based on the record of construction trades labor disruption as described above which existed prior to the negotiation of the Agreement. The resumption of work stoppages would jeopardize MWRA's ability to comply with the deadlines set forth in Schedule 3 and could subject the Authority and its ratepayers to risk of substantial fines. Additionally, such stoppages would give rise to delays in MWRA's construction activities, thereby frustrating its efforts to ameliorate or abate wastewater discharges into Boston

Harbor, thereby prolonging environmental harm to important natural resources in Boston's Inner Harbor and Dorchester Bay. Furthermore, such stoppages and their resultant construction delays could give rise to substantial cost overruns which would have to be borne by the Authority and its ratepayers.

14. Suspending or overturning the terms of the Agreement would further cause the Authority and its ratepayers irreparable harm by diminishing the willingness of the investment community to finance MWRA's capital programs. The Official Statement for the Authority's recent $800,000,000 general revenue bond offering recited a brief history and summary of the Agreement and noted that "[t]he Authority believes that the [A]greement is a prerequisite to the timely completion of the Project." In February, 1990, I participated in an MWRA presentation in Baltimore, Maryland to a group of potential bond purchasers. The general reluctance of this group to participate in our Project's financing, due to labor unrest then existing on the Baltimore waterfront, was dispelled only when I discussed with the group the terms and effects of the Agreement. I am informed that, relying on this representation, the investor group did purchase MWRA bonds.

/s/ Richard D. Fox
RICHARD D. FOX

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. March 22, 1990

Then personally appeared before me the said Richard D. Fox and made oath that the foregoing statements are true.

/s/ Catherine L. Farrell
Notary Public

My commission expires: Feb. 4, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[Title Omitted in Printing]

AFFIDAVIT OF KENNETH M. WILLIS

Kenneth M. Willis, first being duly sworn, deposes and says as follows:

1. I am employed at Kaiser Engineers, Inc. ("Kaiser") as Project Manager to manage, direct, advise, supervise, and consult with the Massachusetts Water Resources Authority ("Authority" or "MWRA") with regard to the Authority's "Boston Harbor Project". I have been in this position since Kaiser was retained by the Authority in April, 1988.

2. Kaiser was retained (after an open bidding process) to advise the Authority and help it prepare for the undertaking of the Boston Harbor Project and among other things to advise the Authority on the development of a labor relations policy for the Project; to investigate and advise the Authority concerning the supply of skilled labor; to advise the Authority on the best methods to avoid labor disruption and delays caused by labor disputes or disruption; and to oversee the labor relations policy as it might be adopted by the Authority. To the best of my belief and understanding, one of the reasons why Kaiser was selected was our experience in overseeing labor relations matters on large construction projects. For example, I had been the Project Manager for the billion dollar Coal Gasification facility construction in North Dakota in the early 1980's, a project which was done under a Project Labor Agreement negotiated with

the Building Trades Department, AFL-CIO and all of the Building Trades Unions.

3. Kaiser Engineers, Inc., including its wholly owned subsidiary company, constitutes a national organization engaged exclusively in the construction industry, including designing, consulting, engineering, and direct hire construction of projects including nuclear power plants; coal gasification facilities; nuclear facilities at the Hanford Federal Reservation; and construction of public transit facilities in Boston, Miami, and Los Angeles. Kaiser has had collective bargaining agreements with hundreds of building trades unions over the last 25 years.

4. Based on Kaiser's labor relations experience, we advised the Authority at an early date that we believed it might be in the best interests of the Authority if Kaiser were permitted to negotiate a Project Labor Agreement to cover the Project. Our recommendations were based on a number of factors including:

A. The rigid time targets established by the United States District Court;

B. The geographical constraints on the Project;

C. The transportation constraints on the Project;

D. The length of time the Project was to be underway;

E. The cost of delays on the Project, based on inflation, the time value of money, and overhead expenses;

F. The fact that, in the Eastern Massachusetts area and in the Suffolk County area in particular, any Project of this size would have a significant union contractor component (in Suffolk County more than 75% of the commercial construction work is done by union contractors), and there-

fore the Project would be vulnerable to labor disputes which could arise from

(i) the renegotiation of local labor agreements with contractor associations every two to three years, with the potential for hundreds of lawful contractual labor disputes resulting in repeated interruption of work and consequent delays in the Project;

(ii) the need to harmonize conditions, such as work hours, travel pay, etc.; and

(iii) the potential for jurisdictional disputes among the various trades, or between the trades and unorganized contractors.

G. If there are one or more unionized contractors working on this multi-craft Project, there is the potential for disputes among craft unions over assignment of work. The jurisdictional dispute mechanisms of the National Labor Relations Board and the AFL-CIO are time consuming and administratively cumbersome.

H. If non-union contractors are working on the site, there is also the potential that their employees would seek to be organized, or the Building Trades Unions would seek to organize them, and in each instance, there is the potential for valid, legal picketing and/or work stoppages which would delay the Project;

I. The fact that without a total no-strike commitment under which the labor organizations waive their right to respect picketing activity, the potential exists for a single picket at the Fore River Staging Area or the entrance to Deer Island to significantly disrupt and delay the Project; and

J. Even with varying degrees of no-strike protection in local labor agreements, a project can still be interrupted unless the contractor has established an expedited arbitration procedure and all parties who may be involved in the dispute are bound to the same procedure.

K. From my experience, an all encompassing labor agreement, which includes expedited disputes resolution procedures for every possible type of labor disruption is the only effective safeguard for the efficient, economical and timely completion of major multi-craft projects.

5. On behalf of Kaiser, I recommended that the Authority consider the desirability of a Project Labor Agreement. We also indicated, however, that the practical and legal parameters of such an Agreement should be fully explored before the Authority considered formal adoption of such an Agreement as its labor relations policy. The staff of the Authority informed me that we were authorized to go forward to explore the possibility and practicality of such an Agreement but that the Authority would withhold any approval of a Project Agreement until negotiations had been completed and the Authority staff had had the opportunity to review the results.

6. In early May, 1989, the Kaiser negotiating team commenced bargaining with the Building and Construction Trades Unions, including the Building and Construction Trades Department, AFL-CIO, its affiliated international unions and their affiliated local unions with the objective of achieving a Project Labor Agreement.

7. I was a member of the negotiating team on behalf of Kaiser, along with C. R. Fitzgerald, W. J. Curtin and E. C. Uehlein, Jr. We informed the Unions, who were led by Mr. John Simmons, President of the Metropolitan Building Trades Council, and Mr. Joseph Nigro, Secretary-Treasurer, that we would hope to negotiate an Agree-

ment which all parties would agree was appropriate for the Harbor Project, but that until final agreement was reached and the document was reviewed by the Authority, there could be no guarantees that the Authority would utilize the Agreement as the labor relations program for the Harbor Project.

8. Negotiations were concluded and an Agreement executed between Kaiser and the Building Trades on May 22, 1989. Subsequently, we recommended to the staff of the Authority that it should be adopted for application on the Boston Harbor Project. In my opinion the Agreement, containing a no-strike pledge from all of the construction unions, the harmonization of many of the working conditions, and the across-the-board procedures for disputes resolution will lead to the most cost effective completion of the Project.

9. It is my understanding that the staff of the Project Management Division accepted Kaiser's recommendation and in turn, recommended that the MWRA Board adopt the Agreement as the labor policy for the Project, and authorize the staff to insert a requirement in the bid specifications for all new construction work requiring that the bidders be willing to abide by the Project Labor Agreement. The Board adopted the staff's recommendation on May 28, 1989.

10. As I have outlined above, Kaiser's role under contract to the Authority is primarily to advise and assist the Authority in getting the Harbor Project underway, and to manage and supervise the ongoing construction activity on the Project. Nevertheless, it is also recognized and expected, and has been since Kaiser commenced this work, that Kaiser would employ direct hire construction labor. Thus, we advised the unions during the negotiations for the Project Labor Agreement that Kaiser would hire craft labor under the Project Labor Agreement and its Schedule A's under one or more of the following circumstances:

A. The default of a contractor;

B. Unsatisfactory or incomplete performance of a subcontractor;

C. Projects requiring limited new construction work, where the time and effort necessary to bid the work is inappropriate, such as construction of temporary facilities for work on the Island, and maintenance and modification of those facilities; and/or

D. Clean-up work at the end of the Project. It would not be unusual for Kaiser to perform direct hire work under the circumstances noted above, and Kaiser has in fact performed such work in the past on construction projects for which it was the General Contractor or the Construction Manager for both public and private owners.

11. The Project Agreement as negotiated permits Kaiser to act as an execution contractor or otherwise perform the direct hire work noted above. Additionally, our agreement with the MWRA permits direct hire construction work on the type of work outlined above.

12. As a result of Kaiser's work in the Eastern Massachusetts area, where Kaiser has maintained an office for 25 years, Kaiser is familiar with the labor relations situation and the local construction unions. It is that experience, as well as our experience throughout the country, which led us to recommend the consideration of a Project Labor Agreement to the Authority. Prior to our recommendation to the Authority, we had had no discussion with organized labor, nor were we informed of or aware of any threats or statements made by organized labor which may have been calculated to induce the Authority or Kaiser to recommend a Project Labor Agreement. The labor disputes with which I am familiar and which occurred on the entrances to Deer and Nut Island are typical, predictable labor disputes involving protests

about the use of non-union contractors and/or working conditions.

/s/ Kenneth M. Willis
KENNETH M. WILLIS

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. March 22, 1990

Then personally appeared before me the said Kenneth M. Willis and made oath that the foregoing statements are true.

/s/ Catherine L. Farrell
Notary Public
My commission expires Feb. 4, 1994

[JANUARY 12, 1990 MEMORANDUM]

TO: JAMES F. SNOW, COMMISSIONER

FROM: PETER WALTONEN, DEPUTY GENERAL COUNSEL—CIVIL DIVISION

RE: FRASER ELECTRIC/M.W.R.A.

DATE: JANUARY 12, 1990

Any analysis of the legality of the "BOSTON HARBOR WASTEWATER TREATMENT FACILITIES PROJECT LABOR AGREEMENT" (Labor Agreement) by the MWRA for use in the bidding of public works construction projects necessarily must begin with an analysis of the Labor Agreement and then proceed to analysis of the relevant federal and state law.

ANALYSIS OF THE LABOR AGREEMENT

The Labor Agreement is an agreement between the MWRA (through Kaiser Engineers) and various local unions signatory to the document. The title itself, "KAISER ENGINEERS, INC. ON BEHALF OF THE MASSACHUSETTS WATER RESOURCES AUTHORITY," declares on its face the relationship between Kaiser Engineering and the MWRA: that of Agent (Kaiser) and Principal (MWRA). Kaiser executed the document as "Project Contractor" on behalf of the MWRA, as its agent.[1]

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[1] See p. 1 of the Labor Agreement "This Project Labor Agreement . . . is entered into this 22nd day of May 1989, by and between Kaiser Engineers, Inc. (hereinafter, the "Project Contractor"), its successors or assigns, . . . with respect to the construction of the wastewater treatment facilities and related facilities in Suffolk and Norfolk Counties, Massachusetts, known as the "Boston Harbor Project." Two employees of Kaiser Engineers signed for the "Proj-

The terms of the Labor Agreement apply to all construction work in connection with wastewater treatment facilities being developed in and around Boston Harbor by the MWRA. It is limited to construction work under the direction of Kaiser Engineers and all contractors of "whatever tier which have contracts awarded for such work on and after the effective date of this Agreement. . ." [2]

The Labor Agreement sets forth the conditions for bidding and award of contract as follows:

> The awarding authority has the "Absolute right to select any qualified bidder for the award of contracts on this Project without reference to the existence or nonexistence of any Agreements between such bidder and any party to this Agreement *provided*, however, *only that such bidder is willing, ready and able to execute and comply with the* [*Labor Agreement*], *should it be designated the successful bidder.*" [3] [emphasis added].

Thus, while the Labor Agreement purports to allow the MWRA to select any qualified bidder, the above-referenced proviso clause limits the term "qualified bidder" to include only those bidders who "execute and comply" with the Labor Agreement, thereby restricting the scope of bidders eligible for award.

The Labor Agreement further requires that "all direct subcontractors" of a successful contractor (one who has been awarded a contract) must "accept and be bound by

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ect Contractor." However, it is important to remember that Kaiser Engineers acted "ON BEHALF OF THE MASSACHUSETTS WATER RESOURCES AUTHORITY" and thus, the Agreement stands upon MWRA's ability to so contract.

[2] Article II, Section 1, p. 4.

[3] Article II, Section 2(a), p. 5.

the [Labor Agreement]."[4] The Labor Agreement provides that said agreement takes precedence over any local, area or national agreements[5] and that the agreement is self-contained and stands alone. Thus contractors are not required to sign any other collective bargaining agreement.[6] The Labor Agreement contains provisions for the resolution of disputes;[7] recognizes the Union as the sole and exclusive bargaining representative of all craft employees working within the scope of the agreement;[8] requires that all applicants for jobs within the various classifications covered by the Labor Agreement be referred by the Union through its hiring hall.[9]

The Labor Agreement further requires that all Apprentices be hired through the Union hiring hall.[10] The Union agrees not to strike during the term of the collective bargaining agreement and in turn, the management agrees not to conduct a lock-out.[11] Either party in any dispute may call for a permanent arbitrator to resolve the dispute.[12]

The justification for such a collective bargaining agreement and its requirement that each successful bidder sign the collective bargaining agreement is stated in the Labor Agreement as follows:

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[4] Article II, Section 2(b), p. 5.

[5] Article II, Section 3(a), p. 5.

[6] Article II, Section 3(b), p. 6.

[7] Article II, Sections 3(b) and 9, pp. 6 and 8.

[8] Article III, Section 1, p. 10.

[9] Article III, Section 2, p. 10.

[10] Article XI, Sections 1 and 2, p. 32 and 33.

[11] Article VI, Section 1, p. 17.

[12] Article VI, Section 4, p. 18.

ARTICLE I

PURPOSE

The Boston Harbor Project, an undertaking of the Massachusetts Water Resources Authority, is the largest public works project in the history of New England. The goal of the Project is to provide effective sewage disposal for the people of Massachusetts. Pursuant to an order issued by the United States District Court for the District of Massachusetts, the Authority has authorized the construction of new wastewater treatment facilities and related facilities to reduce pollution in the Boston Harbor. The Court has ordered that these facilities be completed within specified and limited time frames.

The timely and successful completion of the Project is of vital importance to all the people of the Commonwealth of Massachusetts. Therefore, it is essential that the construction work be done in an efficient and economical manner in order to secure optimum productivity and to eliminate any delays in the work. In recognition of the special needs of this Project and to maintain a spirit of harmony, labor-management peace, and stability during the term of this Project Labor Agreement, the parties agree to establish effective and binding methods for the settlement of all misunderstandings, disputes or grievances which may arise. Therefore, the Unions agree not to engage in any strike, slowdown or interruption of work and the Contractor agrees not to engage in any lockout.

It is uncontroverted that the exclusive use of contractors signatory to Labor Agreements is an active policy implemented by the MWRA in its public works construction projects.

THE LABOR AGREEMENT IS A COLLECTIVE BARGAINING AGREEMENT AND THUS SUBJECT TO THE STANDARDS OF 29 U.S.C.A., S.158, THE NATIONAL LABOR RELATIONS ACT (N.L.R.A.)

There can be no doubt that the instant Labor Agreement is a collective bargaining agreement which the successful bidder on an MWRA project must sign in order to obtain the contract.

Normally, such a requirement would violate the N.L.R.A.; however, in 29 U.S.C.A., s.158(F), the Congress enacted an exception for the building and construction industry. This exception allows an employer who is primarily engaged in the construction industry to enter into a pre-hire agreement and require all contractors and subcontractors to observe the terms of that agreement. This exception to the general requirements of the N.L.R.A. as set forth in s.158(a)(2) and (b) is unique to construction and came about as a result of the uniquely temporary, transitory and sometimes seasonal nature of the construction industry.[13]

29 U.S.C.A., s.158(F) provides in relevant part:

> It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in subsection (a) of this section as an unfair labor practice) because (1) the majority status of such labor

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[13] Kaiser and MWRA admit on p. 9 of their brief that if s.8(F) does not apply, then the instant agreement is a violation of s.8(a)(2) of the N.L.R.A.

> organization has not been established under the provisions of section 9 of this title prior to the making of such agreement . . .

By authorizing so-called "pre-hire" agreements like that at issue in this case, s.8(f) of the National Labor Relations Act, 29 USC s.158(f) [29 USCS s.158(f)], exempts construction industry employers and unions from the general rule precluding a union and an employer from signing "a collective-bargaining agreement recognizing the union as the exclusive bargaining representative when in fact only a minority of the employees have authorized the union to represent their interests." *NLRB v. Iron Workers*, 434 US 335, 344-345, 54 L.Ed2d 586, 98 S.Ct. 651(1978) (*Higdon*). See *Garment Workers v. NLRB*, 366 US 731, 737-738, 6 L.Ed.2d 762, 81 S.Ct.1603(1961). Section 8(f) provides in pertinent part:

> "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section of this Act prior to the making of such agreement . . .: Provided . . . That any agreement [461 US 266] which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to section 9(c) or 9(e)." 73 Stat 545.

Thus, s.8(f) allows construction industry employers and unions to enter into agreements setting the terms and conditions of employment for the workers hired by the signatory employer without the union's majority status first having been established in the manner pro-

vided for under s.9 of the Act. One factor prompting Congress to enact s.8(f) was the uniquely temporary, transitory and sometimes seasonal nature of much of the employment in the construction industry. Congress recognized that construction industry unions often would not be able to establish majority support with respect to many bargaining units. See S Rep No. 187, 86th Cong, 1st Sess, 55-56 (1959) 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, pp 451-452 (Leg Hist). Congress also was cognizant of the construction industry employer's need to "know his labor costs before making the estimate upon which his bid will be based" and that "the employer must be able to have available a supply of skilled craftsmen for quick referral." HR Rep.No. 741, 86th Cong, 1st Sess, 19 (1959), 1 Leg Hist 777. See generally, *Higdon*, *supra*, at 348-349, 54 L.Ed.2d 586, 98 S Ct 651.

A review of the instant Labor Agreement, as it is currently constituted, reveals that such agreement does not and cannot fall within the construction industry exception contained in s.8(f) of the N.L.R.A.

The Labor Agreement meets the first two of the three preconditions for an exception: *i.e.*, the Labor Agreement covers employees in the building and construction industry and is with labor organizations of which building and construction employees are members. However, the employer of those contractors (the MWRA) is not an employer engaged primarily in the building and construction industry; thus the third condition is unmet and the exception in 29 U.S.C.A. s.158(f) allowing pre-hire agreements is inapplicable to the instant Labor Agreement.

It is the MWRA and *not* Kaiser who signs the construction contracts with bidders; bids the projects; owns the property or project built; pays the contractor; has contractual privity with the contractor. Indeed under both M.G.L. c.30, s.39M, and c.149, s.44A-44J, it is the

MWRA who is required by law to bid the project and execute a contract with the successful lowest responsible and eligible bidder. Moreover, public funds are expended on the construction project, not private funds of Kaiser Engineers, Inc. Thus, it is the MWRA who is clearly the employer in this situation.

In signing the Labor Agreement as "Project Manager," Kaiser Engineers, Inc., is acting in the capacity of agent for the MWRA. Kaiser Engineers, Inc., thus stands in the shoes of the MWRA and is precluded from entering into a pre-hire agreement in behalf of the MWRA, where the MWRA itself has no authority to enter into such an agreement.

Moreover, not only does Kaiser Engineers lack contractual privity with any of the contractors who will actually perform work on the project, but Kaiser Engineers is merely the project manager and *not* the primary or general contractor for any project with MWRA in connection with the Boston Harbor Project. Both M.G.L. c.30, s.39M and c.149, ss.44A-44J require that a public bidding process be followed for the selection of the general contractor on any public works construction project. The general contractor must submit a bid to the awarding authority (here the MWRA), thereby creating contractual privity between the contractor and the awarding authority upon execution of a contract.

Thus the fact that Kaiser Engineers is an employer in the building and construction industry is legally irrelevant to the instant matter; the relevant question is whether or not the employer in this matter (the MWRA), is an employer primarily engaged in the building and construction industry. A review of the MWRA enabling legislation contained in M.G.L. c.92 App. Sections 1-1 *et seq.* reveals that the MWRA is not an employer primarily engaged in the building and construction industry.

The question of whether or not a public agency (such as the MWRA) can be an employer under the N.L.R.A. has been answered in the negative. See *Baltimore Building and Construction Trades Council*, 4 AMR par.10,177 (May 10, 1977) *aff'd*, 610 F.2d 1221 (4th Cir. 1979), in which the General Counsel for the N.L.R.B. refused to certify a question involving pre-hire agreements with a municipality *because the municipality was not an employer within the construction industry.* Similarly, the MWRA is not an employer within the construction industry, and thus the exception contained in s.8(f) is inapplicable.

A Massachusetts case in federal district court also held that a political subdivision of the Commonwealth cannot be an employer under the N.L.R.A. See *Local Division 589, Amalgamated Transit Union, AFL-CIO v. Amalgamated Transit Union, AFL-CIO*, 295 F. Supp. 630 (D.C. Mass. 1969) (Inasmuch as applicable state statute expressly labeled transportation authority as political subdivision of the Commonwealth, authority was not an employer under the National Labor Relations Act.) See also *Mass. Council of Const. Emp., Inc. v. Mayor of Boston*, 425 N.E. 2d 346, 384 Mass. 466, certiorari granted; *White v Massachusetts Council of Const. Emp., Inc.* 102 S.Ct. 1273, 455 U.S. 919, 71 L.Ed 2d 458, reversed 103 S.Ct. 1042, 460 U.S. 204, 75 L.Ed. 2d 1. (1981)

Neither the Commonwealth nor any subdivision may act in a manner that frustrates federal labor policy. There is no question that the MWRA is a political subdivision of the Commonwealth for purposes of M.G.L. c.30, s.39M and c.149, ss.44A-44J. See M.G.L. c.92 App., s.1-8(g):

> "The Authority shall be deemed to be a public agency for purposes of and shall be subject to, section forty-four A to forty-four H, inclusive of chapter one hundred and forty-nine of the General Laws, sections

thirty-nine M of chapter thirty of the General Laws . . ."

Accordingly, the exception contained in s.8(f) of the N.L.R.A. is not available to the MWRA and it may not enter into a pre-hire agreement with any union representatives. Therefore the instant Labor Agreement is a violation of the N.L.R.A. provisions and thus, a violation of M.G.L. c.149, s.20(c).

There is a distinct line of case authority which holds that municipal corporations and other public bodies and authorities, in contracting for public works, may not discriminate in favor of union labor by requiring that bidders for such contracts be restricted to employers of union labor where there are responsible contractors who employ other than union labor, or by refusing to award contracts to otherwise qualified and responsible bidders upon the ground that they do not employ union labor, where they are willing to undertake the work at the same or a lower figure.[14]

Under this rule a stipulation in a public contract entered into with the lowest bidder, providing that none but union labor should be employed, has been held void.[15] Some courts have held that a valid contract cannot be let

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[14] *Atlanta v. Stein*, 111 Ga 789, 36 SE 932; *Fiske v. People*, 188 Ill 206, 58 NE 985; *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont. 22, 66 P. 496; *State ex rel. United Dist. Heating, Inc. v. State Office Bld. Com.* 124 Ohio St 413, 179 NE 138, 80 ALR 1376, mandamus allowed 125 Ohio St 301, 181 NE 129, 80 ALR 1379 (holding that a discrimination against a bidder for public work, upon the ground of his intended employment of workmen without regard to their affiliation or non-affiliation with labor unions, will not be permitted); *Electric Appliance Co. v United States Fidelity & G. Co.* 110 Wis. 343, 85 NW 648.

A statute providing that specified work of municipalities shall be done by union labor is invalid. *Wright v. Hoctor*, 95 Neb 342, 145 NW 704, 146 NW 997.

[15] *Adams v. Brenan*, 177 Ill. 194, 52 NE 314.

upon a bid tendered pursuant to an advertisement limiting the right to bid to persons employing, or who would in the future employ, union labor only,[16] while others have held that bidders for public contracts are entitled to ignore provisions in specifications or advertisements for bids requiring that only union labor shall be employed in the work.[17]

A statute requiring that public work shall be done only by union labor has been declared void as undemocratic in plan and contrary to the spirit of our republican form of government.[18] Likewise, in a number of instances, municipal ordinances or resolutions providing in effect that public contracts shall be let only to contractors employing union labor, and stipulations in contracts of municipal corporations requiring employment of union labor, have been held invalid. Such ordinances have been declared void as making unconstitutional discrimination between classes of citizens and because they lay down rules which restrict competition and increase the cost of work.[19]

The Labor Agreement clearly requires as part of MWRA policy[20] that the successful bidder become signatory to the agreement. There is, in fact, no question that a bidder must become signatory to this collective bargaining agreement or face automatic rejection. This requirement violates the N.L.R.A.; furthermore, it is legally irrelevant that the collective bargaining agreement is site-specific rather than a general collective bar-

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[16] *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont. 22, 66 P. 496.

[17] *Marshall & B. Co. v. Nashville*, 109 Tenn 495, 71 SW 815.

[18] *Wright v. Hoctor*, 95 Neb. 342, 145 NW 704, 146 NW 997.

[19] *Atlanta v Stein*, 111 Ga. 789, 36 SE 932; *Miller v Des Moines*, 143 Iowa 409, 122 NW 226; *Electric Appliance Co. v. United States Fidelity & G. Co.*, 110 Wis. 434, 85 NW 648.

[20] See p. 1 of Labor Agreement.

gaining agreement because it is the nature of the agreement and not its scope or duration which violates the act.

The following case citations given by Kaiser and the MWRA are unpersuasive and clearly distinguishable from the instant case on the facts.

In *Morrison-Knudsen Co., Inc.* 13 AMR 23, 061(1986), a pre-hire agreement was entered into by the construction manager for Saturn Corporation (Morrision-Knudsen Co., Inc.) for the Saturn automobile facility in Spring Hill, Tennessee. The Saturn Automobile facility was not a public works project; thus this case is factually different from the MWRA matter. Because the project was a private construction project, Morrison-Knudsen could be hired as the prime contractor and thus enter into a valid pre-hire agreement under 29 U.S.C.A., 158(f). Similarly in *Associated Builders and Contractors of Kentuckiana, Inc. and River City Development Corporation v. Ohbayashi Corporation*, Civil Action No. 87-38 (E.D. Ky. Oct. 26, 1987), the court held that a private company could enter into such a pre-hire agreement; however, this case is a matter involving private, not public, construction. In public construction, a municipality, as a matter of law, cannot be an employer within the N.L.R.A. definition of employer and hence cannot enter into a valid pre-hire agreement. Moreover, in the instant matter, Kaiser is not the prime contractor (by law the prime contractor is the lowest responsible and eligible bidder), nor can it bind the prime contractor (lack of privity between Kaiser and the prime contractor.).

Accordingly, the cases cited by the MWRA and Kaiser are inapposite.

EVEN IF THE INSTANT LABOR AGREEMENT WERE PERMITTED UNDER THE N.L.R.A., THE STATUTORY REQUIREMENTS OF M.G.L. C.30, S.39M AND C.149, SS. 44A-44J WOULD PROHIBIT SUCH AN AGREEMENT.

A. *MASSACHUSETTS CASE LAW PROHIBITS THE FAVORING OF A UNION BY REQUIRING MEMBERSHIP OR BEING SIGNATORY TO A COLLECTIVE BARGAINING AGREEMENT.*

The S.J.C. has held that the requirement of union membership or of being signatory to a collective bargaining agreement cannot be a precondition for obtaining a public contract. See *Goddard v. City of Lowell* 61 N.E. 53 (1901). (A requirement that a printer be authorized to use the union logo in the performance of public printing held to violate law because the requirement favored unions).

Similarly, in *Modern Continental v. Mass Port Authority*, 343 N.E. 2d 362 at 364 (1976), the S.J.C. expressly stated:

> It should be noted that this is not a case in which a public body has restricted bidding for contracts within its domain to unionized firms only [cases cited]. As the trial judge correctly held, unionism is not a statutory requirement to be deemed "responsible" or "eligible," as those terms are used in G.L. c.30, s.39M, and the statute itself would bar the automatic exclusion of any bidder on the sole ground that the bidder employs nonunion workers.

It is noteworthy that in this case the S.J.C. allowed an awarding authority to reject all bids and re-bid a project, *where after investigation* the authority determined that there was a real and significant possibility of labor unrest if the project were awarded to the nonunion low bidder. Nothing in this case allows the awarding authority to arbitrarily reject a bidder for not being a union contractor nor does the case allow the awarding authority to reject only the low bidder and to award to a higher union bidder.

Modern Continental v. Mass. Port Authority is dispositive of the instant matter because the Labor Agreement expressly requires that a contractor become signa-

tory to a collective bargaining agreement in order for the contractor to obtain a public works construction contract,[21] exactly the situation which the S.J.C. ruled would violate c.30, s.39M (and, by implication, c.149, ss.44A-44J). It is legally irrelevant that the Labor Agreement is limited to the construction site and to the duration of the project. The effect of the Labor Agreement is to restrict those public works construction contracts to signatories of the collective bargaining agreement (*i.e.*, union firms). It is a condition of the Labor Agreement that no firm other than one who executes the Agreement can obtain the construction contract.

In *Rudolph v. City Manager of Cambridge*, 341 Mass. 31 (1960), the S.J.C. refused to permit an awarding authority to reject an otherwise competent low bidder on the basis of a local preference ordinance and award instead to a higher bidder. "The statute read as a whole shows an unmistakable intent that the power of the awarding authority to require the rejection of a sub-bid, which is in all formal aspects satisfactory, in favor of a higher available bid, may be exercised only for lack of competence of the rejected bidder." *Id.* at 35.

The Labor Agreement and MWRA policy similarly create an impermissible preference which violates the bid law by imposing the additional requirement of union recognition, thereby changing the statutory requirement of competency based only on bidder "eligibility" and "responsibility." As the S.J.C. made clear in *Rudolph*, it is *never* in the public interest to create an exclusionary policy favoring one group or type of bidder.

In *Alpert v. Springfield Bldg. and Contr. Trades Council*, 156 F. Supp. 754, (D. Mass. 1957), the federal district court specifically held that the harmony provisions of M.G.L. c.149, s.44A, which require a bidder to certify that he is able to furnish labor that can work in harmony

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[21] Labor Agreement, Article II, Section 2(a), p. 5.

with other labor employed was not intended to legalize action which is in violation of National Labor Relations Act provisions relative to strikes, the object of which is to force any employer to cease doing business with any other person. *Modern Continental v. Mass. Port Authority, supra,* cannot and does not stand for the proposition that an illegal action which violates federal law (the N.L.R.A.) is permissible in the Commonwealth; on the contrary, the S.J.C. expressly stated in that case that "the [public bidding] statute itself would bar the automatic exclusion of any bidder on the sole ground that the bidder employs nonunion workers." *Id.* at 364. It is important to remember that this Labor Agreement is in violation of the N.L.R.A. and thus illegal under both federal law and Massachusetts decisional law.

B. *THE MWRA MAY NOT USE THE HARMONY CLAUSE CONTAINED IN THE COMPETITIVE BIDDING STATUTES TO CHANGE THE STATUTORY MEANING OF THE WORDS ELIGIBLE AND RESPONSIBLE*

C.30, s.39M(c) defines lowest "responsible and eligible" bidder as:

> The bidder (1) whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary for the faithful performance of the work (2) who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work . . .

Similarly, c.149, s 4A defines "responsible and eligible" bidder as follows:

> "Responsible" means demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter;

> "Eligible" means able to meet all requirements for bidders or offerors set forth in sections forty-four A through forty-four H of this chapter and not debarred from bidding under section forty-four C of this chapter or any other applicable law, and who shall certify that s/he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.

Both statutes require certification that the bidder can work in harmony with all other elements of labor. This provision (the harmony clause) necessarily contemplates both union and nonunion labor working in close proximity on the same project. *Modern Continental v. Mass. Port Authority, supra* at 364 makes that express holding: "The 'harmony' clause of the statute speaks of the bidder providing 'labor that can work in harmony with all other elements of labor employed or to be employed in *the work*' (s. 39M[c]), and clearly contemplates a situation in which the union and nonunion workers work in some type of proximity to one another." To accept the MWRA's interpretation of *Modern Continental v. Mass. Port Authority, supra*, and the harmony clause contained in both M.G.L. c.30, s.39M and c.149, s.44A, would be to render the phrase "in harmony with all other elements of labor" surplusage, as the MWRA's interpretation of that phrase is harmony created through exclusivity of union contracting.

A statute should be interpreted so as to give meaning to all the words in context; none of the words should be regarded as superfluous. *Commonwealth v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authority*, 352 Mass. 617, 618(1967). *School Comm. of Stoughton v. Labor Relations Comm'n.*, 4 Mass. App. 262, 269(1976). Furthermore, the statute must be construed in "light of the legislative objectives which were served by its enactment so as to effectuate the purpose of the framers. *Interstate Eng. Corp. v. Fitchburg*, 367 Mass. at 757 (1975). The S.J.C. has stated repeatedly that "The pur-

pose of competitive bidding statutes is not only to ensure that the awarding authority obtain the lowest price among responsible contractors, but also to establish an *open* and *honest* procedure for competition for public contracts." *Modern Continental v. City of Lowell*, 391 Mass. 829, 835(1984). See also *Mari and Sons Flooring Co. v. Southeastern Mass. Univ. Bldg. Authy.*, 3 Mass. App. 580(1975). A policy which discriminates against nonunion contractors in preference for union contractors fosters the kind of favoritism which competitive bidding was designed to eliminate. *Interstate Engineering v. Fitchburg, supra.*

Thus the MWRA's position regarding harmony is incorrect given the public bidding scheme, case law and principles of statutory construction, as well as the principles of contract law. (See Section A above). In other words, the MWRA's position is just as untenable as if it were seeking to hire only nonunion contractors and works.

C. *THE MWRA CANNOT USE ITS AUTHORITY TO REJECT ANY OR ALL BIDS TO REQUIRE BIDDERS TO SIGN A COLLECTIVE BARGAINING AGREEMENT*

Neither the reservation of a right to reject any and all proposals in the notice to contractors of bidding on a public construction project, nor the possibility that some violation of former ss.44A to 44L of this chapter might result in a benefit to the public, warrants disobedience of the statutory mandate. *Commonwealth v. Gill*, 5 Mass. App. 337(1977). See also *Rudolph v. City Manager of Cambridge, supra*, in which the S.J.C. rejected the argument that it was in the public interest for an awarding authority to give a preference to a certain class of bidders.

Nor is it dispositive that the determination as to who is the lowest responsible and eligible bidder belongs to the

awarding authority. Such a determination will not withstand judicial scrutiny where the determination is illegal, arbitrary, or capricious. *Capuano v. School Building Committee of Wilbarham*, 330 Mass. 494 (1953). See also *Kopelman v. U. Mass. Bldg. Authority*, 363 Mass. 463 (1973) (Court acts if agency acted unlawfully, or . . . arbitrarily, capriciously, or in abuse of its discretion). Clearly, a determination of the lowest responsible and eligible bidder predicated upon the Labor Agreement cannot survive judicial scrutiny.

D. *AN AWARDING AUTHORITY MAY INCLUDE IN ITS SPECIFICATIONS REQUIREMENTS BEYOND THE STATUTORY MINIMUM PROVIDED THEY ARE NEITHER ILLEGAL NOR CONTRAVENE THE STATUTORY BIDDING SCHEME*

Builders Realty Corp. of Mass. v. Newton, 348 Mass. 65 (1964) holds that an awarding authority may impose requirements beyond the statutory minimum and add other requirements to the specifications as long as those additional requirements are not illegal, unreasonable or in violation of the statutory scheme. Moreover, officers of governmental agencies have authority to bind their governmental bodies only to the extent conferred by their controlling statute. Contract provisions which go beyond the scope of the controlling statute are void. *White Construction Co., Inc. v. Commonwealth*, 385 Mass. 1005 (1981).

It is clear that the instant Labor Agreement, in violating the N.L.R.A., is illegal. It is equally clear from its enabling legislation, M.G.L. c.92 App. s.1-8(g), that the MWRA is subject to the requirements of both bidding statutes (M.G.L. c.149, s.44A-44J, and c.30, s.39M) for public works construction and that the instant Labor Agreement violates both statutes.

Both statutes define the qualifications necessary for the low bidder to obtain award of a contract for construction.

M.G.L. c.30, s.39M defines these qualifications under the terms "eligible and responsible" as follows:

> (c) The term "lowest responsible and eligible bidder" shall mean the bidder (1) whose bid is the lowest of those bidders possessing the skill, ability and integrity necessary for the faithful performance of the work; (2) who shall certify that he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed in the work; (3) who, where the provisions of section eight B of chapter twenty-nine apply, shall have been determined to be qualified thereunder; and (4) who obtains within ten days of the notification of contract award the security by bond required under section twenty-nine of chapter one hundred and forty-nine; provided that for the purposes of this section the term "security by bond" shall mean the bond of a surety company qualified to do business under the laws of the commonwealth and satisfactory to the awarding authority.

M.G.L. c.149, s.44A(1) defines "eligible" and "responsible" as follows:

> "Eligible" means able to meet all requirements for bidders or offerors set forth in sections forty-four A through forty-four H of this chapter and not debarred from bidding under section forty-four C of this chapter or any other applicable law, and who shall certify that s/he is able to furnish labor that can work in harmony with all other elements of labor employed or to be employed on the work.
>
> "Responsible" means demonstrably possessing the skill, ability and integrity necessary to faithfully perform the work called for by a particular contract, based upon a determination of competent workmanship and financial soundness in accordance with the provisions of section forty-four D of this chapter;

M.G.L. c.30, s.39M requires that the contract be awarded to "the lowest responsible and eligible bidder on the basis of competitive bids publicly opened and read by such awarding authority . . ." M.G.L. c.149, s.44A(2) likewise mandates that "Every contract for construction . . . . shall be awarded to the lowest responsible and eligible general bidder on the basis of competitive bids in accordance with the procedure set forth in the provision of section forty-four A to forty-four H, inclusive."

Both statutes set forth the responsibilities of awarding authorities in determining who the lowest responsible and eligible bidder is on each project. C.30, s.39M, requires that an awarding authority make its determination based upon an investigation conducted by the awarding authority after bids are opened. This post bid qualification focuses on whether or not the bidder meets the statutory definition of lowest responsible and eligible bidder under s.39M (c), *supra*. M.G.L. c.149, s.44D sets forth a statutory scheme for pre-qualification of general bidders by the Division of Capital Planning and Operations (D.C.P.O.). Under this scheme, a general bidder submitting a valid certificate of eligibility issued by D.C.P.O. is presumed qualified, absent a determination based on information contained in the statutorily required update statement that the bidder is no longer qualified.

The Labor Agreement in question changes the statutory definition of "lowest responsible and eligible bidder" in both statutes by adding the requirement that a general bidder be willing and able to sign a pre-hire agreement for union recognition on the project. Neither statutory definition (contained in c.149, s.44A, and c.30, s.39M) requires union recognition as a condition of award of a construction contract. Indeed, the statutory scheme contemplates award to competent contractors *without further restriction on qualifications* (*i.e.*, union or nonunion contractors). *Modern Continental v. Mass. Port Authority*, *supra* at p.364 specifically held: ". . . unionism is not a

statutory requirement to be deemed "responsible" or "eligible," as those terms are used in G.L. c.30, s.39M, and the statute itself would bar the automatic expulsion of any bidder on the sole ground that the bidder employs nonunion workers."

The decision in *Modern Continental v. Mass. Port Authority, supra*, is dispositive of the question as to whether or not a bidder may be required to be a union firm in order to bid or to be awarded a contract and is in accord with a long and consistent line of cases which determine the requirements of the public bid laws of this Commonwealth.

Statutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally. See *Modern Continental v. Lowell*, 391 Mass. 829 (1984); *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 696-697 (1980); *Interstate Eng'g Corp. v. Fitchburg*, 367 Mass. 751, 757-758 (1975); *Morse v. Boston*, 253 Mass. 247, 252 (1925); *James J. Welch & Co. v. Deputy Comm'r of Capital Planning and Operations*, 387 Mass. 662, 666 (1982).

Moreover, in *Modern Continental v. City of Lowell, supra* at 836 the S.J.C. held that bidder prequalification is no mere formality; it is a cornerstone of the competitive bidding statute. As such, any specification which affects bidder qualification or the statutory scheme for bidding of public works construction is in violation of the public bid laws.

It is clear that the Labor Agreement as currenty written exceeds the MWRA's authority, affects statutory bidder qualification requirements, reduces meaningful competition, is exclusionary (nonunion bidders cannot obtain any contract), promotes favoritism (promotes union over nonunion) and is thus in violation of the law. It is a specious argument that everyone is free to bid and that

therefore the process is not exclusionary; only contractors who become signatory to the Labor Agreement can obtain the contract;[22] a contractor's refusal to execute the agreement results in automatic disqualification and award to the next highest bidder.

THE LABOR AGREEMENT AS PRESENTLY WRITTEN VIOLATES THE REQUIREMENTS OF M.G.L. C.149, S.44F (THE FILED SUB-BID LAW)

M.G.L. c.149, s.44F specifically requires that all filed sub-bidders customarily perform all their sub-tradework with their own employees. Except for specialty work which under current trade practices is customarily sub-sub contracted, the sub-bidder is required to install all materials himself: "Each separate section in the specifications . . . *shall require the subcontractor to install all materials* to be furnished by him under such section." c.149, s.44F(1).

The statutory form for sub-bid (signed under penalties of perjury), as prescribed by c.149, s.44F(2), reiterates the requirement that each sub-bidder must himself perform *all* of his sub-trade work and may not subcontract the work out to another contractor: "The undersigned [*i.e.*, the filed sub-bidder] proposes to *furnish all labor* and materials required for completing . . . *all* the work specified. . . . [emphasis added]."

Section 6 of c.4 provides that words and phrases in a statute shall be construed according to the common and approved usage of the language. The plain language is founded on the presumption that the Legislature meant what the words in a statute plainly say. *State Board of*

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[22] See Article II, Section 2(a), p. 5, of the Labor Agreement: The MWRA has the "absolute right to select any qualified bider for the award of contracts on this Project . . . provided, however, only that such bidder is willing, ready and able to execute and comply with the [Labor Agreement], should it be designated the successful bidder."

Retirement v. Boston Retirement Board, 391 Mass. 92, 94 (1984). A statute's language is the primary source of its meaning, and when the statute is unambiguous, it must be construed as written. *Zoning Board of Appeals of Greenfield v. Housing Appeals Committee*, 15 Mass. App. Ct. 533, 562 (1983).

The plain language of c.149, s.44F, absolutely mandates that the *filed sub-bidder* (not any sub-contractor) *shall* install *all* materials (except for specialty work customarily sub-subcontracted in the trade). It is a well-settled rule of statutory construction that the word *shall* ordinarily indicates that a statutory provision containing directions to public officers is mandatory. *Hashimi v. Kalil*, 388 Mass. 607, 609-10 (1983).

Two Massachusetts cases, *Burgess & Blacher Company v. Beverly Housing Authority*, 351 Mass. 88 (1966) and *Quincy Ornamental Iron Works, Inc. v. Findlen*, 353 Mass. 85 (1967) hold that a filed sub-bidder must customarily perform the work of the sub-trade with his own employees and that an awarding authority must conduct an investigation to determine that a sub-bidder does so perform prior to award of a contract. Any filed sub-bidder who does not perform with his own employees is not eligible for award.

Neither the statute nor case law defines the meaning of the phrase "with his own employees"; accordingly, under the rules of statutory construction, the statute must be interpreted according to the intent of the legislature, as ascertained from all its words, construed by ordinary and approved usage of language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied, and main object to be accomplished, to the end that the purpose of its framers may be effectuated. *Comm. v. Galvin*, 388 Mass. 326 (1983).

Both the MWRA and Kaiser acknowledge in their brief that the purpose of the requirement in s.44F is "to pre-

vent sub-bidders from letting out the work to non-bidders . . .[23] The intent is clearly to prevent sub-sub-bidding, or brokering of a filed sub-bid.[24]

The MWRA and Kaiser argue that in order to meet the statutory requirement, a filed sub-bidder merely needs to add a worker to his payroll. Their contention is that a filed sub-trade contractor may hire his entire work force from a union hall or from the street and satisfy the requirement that he customarily perform with his own employees.

However, such an interpretation leaves the filed sub-bidder as nothing more than a broker and provides a simple vehicle for sub-sub-contracting a filed sub-bid contract. Under the MWRA and Kaiser's theory, a filed sub-bidder easily could evade the intent of the statute by hiring an entire crew of another contractor, the contractor and his equipment and putting them on his payroll. This scenario would make the other company and its employees "employees" of the sub-bidder. This interpretation would render the statute nugatory or make it impossible to administer. Such interpretations are not favored by Massachusetts courts. See *Hein-Werner Corp. v. Jackson Industries*, 364 Mass. 523 (1974) (Construction of statute which would effectively nullify or make it impossible to administer are not to be favored.).

Even assuming that MWRA and Kaiser are correct that it is the industry practice for subcontractors to customarily hire their workers after obtaining a contract, the practice is irrelevant in interpreting Massachusetts law. The majority of work performed in the construction trade does not involve public works construction and nothing in general contract law would prohibit such a practice in private construction. The legislative intent in

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[23] Brief, p. 16.

[24] This Department routinely prosecutes contractors who illegally sub-subcontract filed sub-tradework.

enacting the statute requiring competitive bids for contracts for public works construction was to protect the public. *Grande & Son, Inc. v. School Housing Committee of North Reading*, 334 Mass. 252 (1956).

The intent of the statutory requirement presupposes an existing work force for the filed sub-bidder which may be supplemented if the need arises. It is this work force, the sub-bidder's employees, who must be used to perform the work. This requirement prevents brokering of subtrade contracts and assures quality work by trained workers.

There is a vast difference between supplementing an already existing work force and obtaining an entirely new workforce in the performance of a public works construction contract because it is the filed sub-bidder who is responsible for the quality of his work. Any inadequate performance by the filed sub-bidder can result in debarment from further public work contracts.

The requirement in the Labor Agreement that subbidders use employees exclusively from the union hiring hall violates M.G.L. c.149, s.44F.

THE MASSACHUSETTS SUPREME JUDICIAL COURT HAS STRICTLY CONSTRUED THE REQUIREMENTS OF THE PUBLIC BID LAW

The S.J.C. consistently has stricken down specifications which violate the statutory scheme set forth in M.G.L. c.149, s.44A-44J and c.30, s.39M.

> . . . The general rule in this Commonwealth is that failure to adhere to statutory bidding requirements makes void a contract entered into without such compliance. *Phipps Prods. v. M.B.T.A.*, 387 Mass. 687 (1982). Statutory bidding procedures are designed to prevent favoritism, to secure honest methods of letting contracts in the public interest, to obtain the most favorable price, and to treat all persons equally See *Modern Continental v. City of*

Lowell, 391 Mass. 829(1984), *Datatrol, Inc. v. State Purchasing Agent*, 379 Mass. 679, 696-697(1980); *Interstate Eng's Corp. v. Fitchburg*, 367 Mass. 751, 757-758; *Morse v. Boston*, 253 Mass. 247, 252(1925). To effectuate these purposes, as the opinions just cited show, contracts made in violation of bidding requirements have generally been held to be unenforceable. See *Adalien Bros. v. Boston*, 323 Mass. 629, 631-632(1949); *Burt v. Municipal Council of Taunton*, 272 Mass. 130, 133-134(1930) *Safford v. Lowell*, 255 Mass. 220, 227(1926); *Bowditch v. Superintendent of Streets of Boston*, 168 Mass. 239, 243(1897). This court has requird strict adherence to bidding requirements even where no harm to the public authority was shown (*Bowditch v. Superintendent of Streets of Boston, supra* at 244[1926]; where the violation benefited the public (*Grande & Son v. School Hous. Comm. of N.Reading*, 334 Mass. 252, 258[1956]; *East Side Constr. Co. v. Adams*, 329 Mass. 347, 352 [1952]); and where there was no showing of bad faith or corruption (*Gifford v. Commissioner of Pub. Health*, 328 Mass. 608, 617[1952]).

Similarly, a Labor Agreement which chills the open and honest competition mandated by *Interstate, supra* and *Modern Continental v. Lowell, supra*, by restricting eligible bidders to those "willing, ready and able to execute and comply with" such an agreement will be stricken down because it violates the statutory mandate by monopolizing the work. Massachusetts case law compels such a finding of violation of the competitive bidding statutes.

THE INSTANT MATTER IS LEGALLY DISTINGUISHABLE FROM PRIOR DEPARTMENTAL DECISIONS INVOLVING MBE & WBE REQUIREMENTS

There are legal precedents which require affirmative action programs where federally assisted construction projects are involved. See *Contractors Association of*

Eastern Pennsylvania v. Shultz, 311 F. Supp. 1002 (1970) (upholding the "revised Philadelphia Plan" which implemented the Presidential Executive Order No.11246). In *Associated General Contractors of Mass., Inc. et al. v. Alan Altshuler et al.*, U.S. Court of Appeals, First Circuit, 490 F.2d 9 (1973), the Court upheld as constitutional the inclusion of affirmative action language in public construction contracts of the Commonwealth as a remedy for racial discrimination under the Fourteenth Amendment of the U.S. Constitution. The Department's prior decisions were based upon this legal precedent.[25]

No such legal precedents exist which allow the type of exclusionary agreement proposed by the MWRA and Kaiser Engineers in the Labor Agreement which MWRA seeks to implement.

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[25] The U.S. Supreme Court's recent decision in *Richmond v. Croson*, 109 S.Ct. 706 (1989), makes such mandatory minority set-aside provisions in construction contracts illegal, absent proof of actual discrimination.

MARYLAND TRANSPORTATION AUTHORITY

[EMBLEM]

BALTIMORE HARBOR TUNNEL THRUWAY

PROPOSAL FORM

CONTRACT NO. BRB 9-932

REHABILITATION & WIDENING OF THE BAYVIEW YARDS BRIDGE

BALTIMORE CITY

JANUARY, 1987

MARYLAND TRANSPORTATION AUTHORITY LABOR STABILIZATION AGREEMENT

THIS AGREEMENT, made this 31st day of October, 1986 by and between the Maryland Transportation Authority an Agency of the State of Maryland (hereinafter referred to as the "Authority") and the Baltimore Building and Construction Trades Council, AFL-CIO (hereinafter referred to as "Unions").

WITNESSETH:

WHEREAS, the successful completition of the Baltimore Harbor Tunnel Rehabilitation Project is of the utmost importance to the general public in the Baltimore Metropolitan area; and

WHEREAS, during the construction of the Baltimore Harbor Tunnel Rehabilitation Project, large and varied segments of population will be directly and indirectly involved; and

WHEREAS, the contracts for the Baltimore Harbor Tunnel Rehabilitation Project will be awarded in accordance with the competitive bidding provisions and requirements of the State of Maryland, and

WHEREAS, the work to be done will require maximum cooperation from the many groups which will be involved; and

WHEREAS, large numbers of skilled and unskilled workmen will be required in the performance of the construction work, and recognizing that in all likelihood many of such skilled and unskilled workmen will be represented by unions affiliated with the Baltimore Building and Construction Trades Council, AFL-CIO (including the Brotherhood of Teamsters) and employed by contractors who are signatory to collective bargaining agreements with said labor organizations; and

WHEREAS, it is recognized that on a Project of this magnitude, spreading over an area with multiple labor contracts and employer associations, jurisdictional disputes or conflicts of interest could delay or disrupt orderly completion of the Project; and

WHEREAS, the interests of the general public, the Authority, the Unions and contractors require that the construction program proceed in an orderly manner without disruptions because of work stoppages of any kind, jurisdictional disputes or labor strife.

NOW, THEREFORE, IT IS AGREED between the parties hereto as follows:

ARTICLE I

DEFINITIONS

1. The term "Authority" means the Maryand Transportation Authority, an agency of the State of Maryland, or its authorized agent.

2. The term "Baltimore Harbor Tunnel Rehabilitation Project" or "Project" means the rehabilitation of the Baltimore Harbor Tunnel (TFA-2-9700-50), The Baltimore Harbor Tunnel Toll Plaza (TFA-2-9720-50), the Bayview Yards Bridge (BRB 9-932), The Boston Street, O'Donnell Street, Canton Railroad and Lombard Street Bridges (TFA-2-9760-50R), and the reconstruction of portions of the Patapsco Avenue, Potee Street, Shell Road and Child Street Bridges and ramps (TFA-2-9740-50) as defined within the geographical limits of the contract documents.

3. The term "UNIONS" means the Baltimore Building and Construction Trades Council, AFL-CIO and its affiliate local unions signatory hereto.

4. The term "EMPLOYERS" means those Employers who become signatory to this Construction Labor Stabilization Agreement or who are or become signatory to a

collective bargaining agreement with any Union affiliated with the Balitmore Building and Construction Trades Counsil, AFL-CIO whose agreement is applicable within the geographical area covered by the Baltimore Harbor Tunnel Rehabilitation Project.

5. The term "CONSTRUCTION WORK" means all onsite work (including demolition) necessary to the construction of said Project which is within the recognized jurisdiction of the Unions signatory hereto. It is recognized and agreed by the parties hereto that the construction work for the Baltimore Harbor Tunnel Rehabilitation Project will be let in accordance with the competitive bidding procedures of the State of Maryland.

ARTICLE II

PURPOSE

The purpose of this Agreement is to insure that all construction work on the Baltimore Harbor Tunnel Rehabilitation Project shall proceed economically, efficiently, continuously without interruption and with due consideration for the protection of labor standards, wages and working conditions.

The "Authority", "Employers" and "Unions" do establish and put into practice effective and binding methods for the settlement of all misunderstandings, disputes or grievances that may arise between the Authority, Employers and Unions or its members to the end that the Authority, Employers and Unions are assured of complete continuity of operations, without slow-down or interruption of any kind, and that labor-management peace is maintained.

ARTICLE III

SCOPE OF AGREEMENT

This Construction Labor Stabilization Agreement shall be applicable to all contractors performing onsite construction work on the Baltimore Harbor Tunnel Rehabili-

tation Project, also designated as I-895, but it shall not be applicable to work performed under a legitimate manufacturer's warranty or work performed offsite.

This Agreement is not intended to, and does not cover the operation or maintenance of the Baltimore Harbor Tunnel.

This Agreement shall not apply to executives, managerial employees, engineering employees (including inspectors), supervisors (except those covered by existing collective bargaining agreements), timekeepers, office and clerical employees or employees in confidential positions.

It is the intent of this Agreement to comply with all applicable federal, state and local laws and regulations and nothing in this Agreement shall limit the selection or utilization of contractors or subcontractors to perform construction work on the Project; provided, however, that all such contractors shall comply with the terms of this Agreement.

This Agreement is not intended to supersede collective bargaining agreements between an Employer performing construction work on the Baltimore Harbor Tunnel Rehabilitation Project and a union, except to the extent that the provisions of the Agreement are inconsistent with said collective bargaining agreement, in which latter event, the provisions of this Agreement shall apply.

ARTICLE IV

EFFECT OF AGREEMENT

(a) By executing this Agreement, Unions agree to be bound by each and all of the provisions herein. By accepting any award of construction work, either as contractor or subcontractor (of any level or tier), on any part of the jobsite of the Project, each Employer agrees (i) to be bound by each and every provision of his Agreement, (ii) to execute, either personally or through a duly author-

ized agent (in the form set forth in either Exhibit A or Exhibit B hereto) its agreement to that effect, and (iii) to require that any Employer which is a subcontractor to it agree in writing (in form set forth in either Exhibit A or Exhibit B hereto) to be bound by the terms of this Agreement.

(b) This Agreement is not intended to supersede existing collective bargaining agreements already in existence or hereafter executed between an Employer performing work on the Project and a Union, except to the extent the provisions hereof are directly inconsistent therewith.

(c) Nothing in this Agreement shall affect territorial jurisdiction as between the signatory Unions. Such territorial jurisdiction is recognized as defined by the signatory Unions.

ARTICLE V

WORK STOPPAGE AND LOCKOUTS

(a) There shall be no strikes, work stoppages, picketing, handbilling, public notices, or slowdowns of any kind, for any reason, or threats of any kind to engage in such conduct, by the Unions or employees against the Employers. Neither the Union nor any of its members shall commit any act whatsoever, including picketing, handbilling and public notices, to cause or attempt to cause any work interruption or slowdown of any kind at the Project jobsites.

(b) Similarly, there shall be no lockout of any kind, or threats to engage in a lockout by an Employer covered by this Agreement.

(c) In the event that the Project work is not completed by an Employer by the termination date of its current collecitve bargaining agreement between the Employer and the Union, and the Union gives notice of demands for a new or modified collective bargaining agreement after said termination date, the Union agrees that it

will not strike the Employer on said Project and that the said current collective bargaining agreement as changed or modified shall continue in full force; and the Employer agrees that when the Union consummates a new or modified collective bargaining agreement with the Employer with which it negotiates collective bargaining agreements, the Employer shall adopt said agreement as its own agreement with the Union and shall pay all the new wage rates, and fringe benefit contributions, and shall apply all other terms and conditions of employment contained in said new agreement between the said Employer and the Union retroactively to the termination date of said current agreement between the Employer and the Union with respect to the employees represented by the Union and employed on said Project.

(d) In the event of a strike or lockout in violation of this Article, the grievance and arbitration procedure set forth in Article IX hereof shall not be the exclusive remedy therefore and no party hereto shall be required, as a condition of commencing or maintaining any action at law or equity, to process the claim for such violation under said grievance and arbitration procedure.

ARTICLE VI

JURISDICTIONAL DISPUTES

Jurisdictional disputes over the division of work between crafts shall be settled in accordance with the procedural rules and regulations of the Joint Administrative Committee under the Plan for the Settlement of Jurisdictional Disputes in the Construction Industry, effective June, 1984. There shall be no strikes, work stoppages, slowdowns or interference with the progress of the work on the Project by reason of jurisdictional disputes.

In an effort to eliminate as many jurisdictional problems as possible, the Employer, prior to starting any work on the Project must engage in pre-assignment (mark-up)

meetings with the business representatives of the various local unions to reach agreement on all anticipated work assignments. The parties will resolve all differences by negotiation and discussion. General work items of jurisdiction shall also be established and agreed to, before work on the Project is started.

There shall be no actual or threatened work stoppage, work interruption, strike, picketing, handbilling, or public notice of any kind in connection with any jurisdictional dispute, or if a Union or an Employer fails to immediately and fully comply with the decision in any jurisdictional dispute, the provisions of this Article shall immediately become null and void insofar as that particular dispute is concerned and the Authority, Employer or Union shall have the immediate right to seek full legal redress for such conduct.

ARTICLE VII

MANAGEMENT RIGHTS

Employers retain full and exclusive authority for the management of their respective operations subject to Article VI, VII and IX of this Agreement. Except as expressly limited by the provisions of this Agreement, an Employer may direct its working forces at its sole prerogative, including hiring, selection or supervision, promotion, transfer, layoff or discharge. An Employer shall have the right to utilize any work methods, procedures or techniques of construction. No rules, customs or practices shall be permitted or observed which in any way limit the selection or use of materials and equipment. The Employer shall schedule the work and shall determine the overtime and manpower requirements necessary to perform the work.

Because of the peculiar nature of the Project, only limited means of access will be available to the jobsites.

Any Employer subject to this Agreement hereby agrees: (1) that he shall employ each of his employees to do work only within the classification of employment designated by the Employer at the time of said employee's initial employment on this Project, it being understood that an Employer may, without limitation, shift an employee from a category within a particular classification to another category within the same classification and pay appropriate prevailing wages. An Employer may reassign an employee to a higher paying classification in which case the Employer shall have the employee do work only within categories of said higher paying classification for the duration of the instant construction contract: (2) he shall pay to each employee, at a minimum, the prevailing wage rate applicable to the classification. At the instance of any party to this Agreement of a complaint that (1) or (2) herein is being violated by any contractor or sub-contractor, the complaint shall be treated and considered as a grievance subject to the procedures of Article IX of this Agreement.

ARTICLE VIII

JOINT PROJECT LABOR COMMITTEE

A Joint Project Labor Relations Committee, consisting of a representative from the Authority and from each of the Employers and the Unions, shall be established for the Baltimore Harbor Tunnel Rehabilitation Project. Said Joint Project Labor Relations Committee shall meet, at intervals deemed appropriate or upon call, for the purpose of establishing work rules, and promoting harmonious labor relations on the Baltimore Harbor Tunnel Rehabilitation Project.

ARTICLE IX

GRIEVANCE PROCEDURE

Any question or dispute arising out of and during the term of this Agreement involving its interpretation and application (other than trade jurisdictional disputes re-

ferred to in Article VI hereof) or any actual or threatened work stoppages, lockouts, or picketing shall be handled under the following procedures:

Step 1

Any grievance must be submitted in writing to the other party within five (5) calendar days of its becoming known or it will be considered closed. Upon receipt of written notification from either party of a dispute which is, for the reasons herein above stated, unresolved, the other party shall, within a period not to exceed five (5) working days, make an effort to settle the dispute with the appropriate local union representative.

Step 2

If, within five (5) working days, the dispute remains unresolved, it will be settled by the International Union Area Representative and the designated Labor Relations Representative of the Employer.

Step 3

If within five (5) working days, the dispute remains unresolved, it will be settled by the President of the International Union or his representative and the home office Labor Relations Representative of the Employer.

Step 4

If the issue is not resolved within twenty (20) days, from the date of its original submission, the Employer and the Union involved shall request the Commissioner of Labor and Industry of the State of Maryland, or his specifically designated representative, to hear and determine the dispute. The Commissioner of Labor and Industry, or his representative, shall then hear the grievance at the earliest mutually convenient time. Each party shall have the right to present whatever evidence it deems desirable at any hearing. The decision of the Commissioner of Labor and Industry shall be final and binding upon all parties and any individual involved.

Any party shall have the right to have a transcript made of the proceeding at its own expense.

ARTICLE X

CONTINUOUS EMPLOYMENT OF EMPLOYEES

An employee assigned to work on a specific part of the Baltimore Harbor Tunnel Rehabilitation Project may be retained continuously by his Employer on such work without regard to geographic divisions of jurisdiction between any Unions.

ARTICLE XI

TERM OF AGREEMENT

This Agreement shall become effective on or prior to the award of the first construction contract for the Baltimore Harbor Tunnel Rehabilitation Project whichever comes first, and shall continue in full force and effect until the completion of the Baltimore Harbor Tunnel Rehabilitation Project as defined within the geographical limits of the contract documents. This Agreement shall continue in full force and effect from year to year thereafter unless either party advises the other, in writing, of a desire to terminate or modify this Agreement.

IN WITNESS WHEREOF, the parties hereto have affixed their signatures on the date first herein mentioned.

Approved as to form and legal sufficiency this — day of ——, 1986.

/s/ [Illegible]
Assistant Attorney General

SIGNATURE PAGE

BALTIMORE HARBOR TUNNEL REHABILITATION PROGRAM

MARYLAND TRANSPORTATION AUTHORITY

By: /s/ Anthony P. Frate
ANTHONY P. FRATE
Executive Secretary

BALTIMORE BUILDING AND CONSTRUCTION TRADES COUNCIL, AFL-CIO

By: /s/ Charles H. Reish

Signed in Baltimore, Maryland this 31st day of October, 1986

UNION:

/s/ [Illegible]
ASBESTOS WORKERS
LOCAL 11

/s/ [Illegible]
BOILERMAKERS
LOCAL 193

/s/ [Illegible]
CEMENT MASONS
LOCAL 43

/s/ [Illegible]
ELECTRICAL WORKERS
LOCAL 24

/s/ [Illegible]
ELEVATOR
CONSTRUCTORS
LOCAL 7

/s/ [Illegible]
OPERATING ENGINEERS
LOCAL 37

/s/ [Illegible]
IRONWORKERS
LOCAL 16

/s/ [Illegible]
LABORERS' DISTRICT
COUNCIL

/s/ [Illegible]
LEAD BURNERS
LOCAL 153

/s/ [Illegible]
MILLWRIGHTS
LOCAL 1548

/s/ [Illegible]
PAINTERS DISTRICT
COUNCIL NO. 23

/s/ [Illegible]
PLASTERERS' LOCAL 155

/s/ [Illegible]
PLUMBERS LOCAL 48

/s/ [Illegible]
ROOFERS LOCAL 80

/s/ [Illegible]
SHEET METAL
WORKERS LOCAL 100

/s/ [Illegible]
SPRINKLER FITTERS
LOCAL 536

/s/ [Illegible]
STEAMFITTERS
LOCAL 438

/s/ [Illegible]
TEAMSTERS LOCAL 311

AGREEMENT TO BE BOUND

The undersigned, as a contractor or subcontractor on the Baltimore Harbor Tunnel Rehabilitation Project, for and in consideration of the award to him of a contract to perform work on said Project, and in further consideration of the mutual promises made in the Maryland Transportation Authority Labor Stabilization Agreement, hereby:

(1) Accepts and agrees to be bound by the terms and conditions of the Maryland Transportation Authority Labor Stabilization Agreement, together with any and all amendments and supplements thereto, and accepts and agrees to bind any partnership or joint venture arrangements in which the undersigned may enter for the purpose of obtaining a contract to perform work on said Project.

(2) Certifies that he has no commitments or agreements which would preclude his full and complete compliance with the terms and conditions of said agreement.

(3) Agrees to secure from any Employer (as defined in said Agreement) which is a subcontractor (of any tier) to him a duly executed Agreement To Be Bound in form identical to this document or to Exhibit B attached to said Agreement.

Date: ....

By: .....

AGREEMENT TO BE BOUND

The undersigned, an Employer Association as defined in the Maryland Transportation Authority Labor Stabilization Agreement, as agent by and for those of its members listed below, for and in consideration of the award to one or more of such members of a contract to perform work on the Baltimore Harbor Tunnel Rehabilitation Project, and in further consideration of the mutual promises made in the Maryland Transportation Authority Stabilization Agreement, hereby:

(1) Warrants that it has the authority to execute this Agreement To Be Bound for and on behalf of its members listed below;

(2) For and on behalf of its members listed below, accepts and agrees to be bound by the terms and conditions of the Maryland Transportation Authority Labor Stabilization Agreement, together with any amendments and supplements thereto;

(3) Certifies that none of its members has any commitments or agreements which would preclude their full and complete compliance with the terms and conditions of said agreement;

(4) For and on behalf of its members listed below, agrees that each of such members as may be awarded work on the Baltimore Harbor Tunnel Rehabilitation Project shall secure from any Employer (as defined in said agreement) which is a subcontractor (of any tier) to him a duly executed Agreement To Be Bound in form identical to this document or to Exhibit A attached to said Agreement.

DATED: ....

BY: .....

Members Covered: